INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY

FOURTH SOKOL COLLOQUIUM

RICHARD B. LILLICH

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Editor

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FOREWORD

This, the Fourth Annual Sokol Colloquium, has a slightly different emphasis from its predecessors. The Colloquium is held primarily to emphasize private international law issues. Yet this year the decision was made to focus on problems of criminal procedure in an international context. The decision reflects two judgments made in the course of preparing for the Colloquium: First, when antitrust and certain other laws are enforced, the distinction between public and private enforcement cannot be sharply drawn, as public enforcement and public actions can substantially affect litigation rights and opportunities of private litigants. Second, ordinary people engaging in various international and foreign transactions need and want to know what their government can do to control and monitor their activities, what control foreign governments have over them, and what protections their government might afford them from foreign pressures.

In short, the decision was that the line between public and private international problems ought not to be viewed as a bright and clear one; people acting outside their usual home territory need to know about both civil and criminal procedures and about the reach, coercive as well as protective, of both.

The Colloquium begins by analyzing the question of how one nation can seek to obtain people from other nations against whom it claims the right to enforce its laws and the related question of how a nation requested to turn someone over to another nation is likely to respond to the request. Extradition and rendition are the key "power" concepts here. Among the limitations on the powers are possible constitutional restraints and the political offense doctrine.

Following this, there is a brief examination of problems that one nation's courts and litigants may have in obtaining evidence held in other nations. The massive Uranium Cartel cases in which so many important international

aspects of antitrust are being litigated is the vehicle for exploring this subject. This ends Part I of the Colloquium.

After examining the problems of getting people and evidence, the Colloquium looks at the attempts of the United States to expand its direct enforcement power outside the land borders of the fifty states. The harder it is to get cooperation from other nations the more likely a country is to want to act on its own behalf. Although this is understandable, at least in the United States there may be constitutional limits on the manner in which direct enforcement is attempted. These limits are explored in Part II.

Finally, the Colloquium turns from an analysis of how nations seek foreign help to enforce their laws, and the possible problems with direct enforcement, to how nations may seek to protect their citizens from the hardships associated with being targets of foreign law enforcement efforts. Attention is paid primarily to the rise of treaties to protect United States citizens from the cruelties of foreign prisons. The question that is debated is whether pursuant to treaties Americans subject to extremely cruel punishments, often imposed following litigation in which typical American procedural safeguards are not provided, can continue to be incarcerated when returned to the United States.

The goal of this Colloquium is to enhance understanding of criminal processes in the international setting by renewing inquiry into familiar problems and by calling attention to some new ones.

Stephen A. Saltzburg

Charlottesville, Virginia
November 1980

ACKNOWLEDGMENTS

The Gustave Sokol Program in Private International law, established at the University of Virginia School of Law in 1976 pursuant to a grant from the Gustave Sokol Fund, has concentrated its efforts to date on a series of annual, two-day colloquia treating in detail topics of private international law not covered or not receiving adequate attention in the regular Law School curriculum. In addition to bringing together distinguished scholars, practitioners and government officials from here and abroad to present papers and share ideas, these colloquia are designed to produce a printed record that will stimulate future research and reform in the areas discussed.

Accordingly, many of the papers presented at the First Sokol Colloquium in 1977, on "Enforcement of Foreign Judgments and Arbitral Awards," appeared as a symposium in 17 *Virginia Journal of International Law* 359-493 (1977). Again, many of the papers delivered at the Second Sokol Colloquium in 1978, on "Proving Foreign and International Law in Domestic Tribunals," subsequently were published in a symposium appearing in 18 *Virginia Journal of International Law* 609-751 (1978). The success of these symposia, coupled with a desire to make the record resulting from the colloquia more rapidly and widely available, especially to persons overseas, led to the decision to publish future colloquia in hardcover form.

Hence, beginning with the Third Sokol Colloquium in 1979, the School of Law, in conjunction with the publishers of this volume, has undertaken the editing and publishing of the colloquia on an annual basis. The principal papers of the Third Sokol Colloquium have appeared recently under the title *The Family in International Law [Third Sokol Colloquium]* (R. Lillich ed. 1980). The present volume contains all of the papers delivered at the Fourth Sokol Colloquium in 1980 on "International Aspects of Criminal Law." Earlier versions of several of the chapters have

appeared in the *Virginia Journal of International Law*, with whose permission they appear herein.

For the record, the undersigned served as Chairman of the Fourth Sokol Colloquium. Mr. Kenneth R. Lee, Class of 1982, University of Virginia School of Law, was Student Coordinator for the John Bassett Moore Society of International Law, which cosponsored the colloquium along with the American Society of International Law. Mr. Ross Clayton Mulford, Class of 1982, University of Virginia School of Law, ably assisted the undersigned in editing this volume. It scarcely needs mention that the entire venture would have been impossible without the initial grant and several subsequent generous grants from the Gustave Sokol Fund, for which Dean Richard A. Merrill and the entire Law School community once again express their appreciation.

Richard B. Lillich

Cambridge, England
November 1980

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Chapter One

OBTAINING PEOPLE AND EVIDENCE FROM ABROAD THROUGH FORMAL LEGAL PROCESSES

A. Obtaining People

Extradition and Rendition: Problems of Choice

Alona E. Evans

Our topic is "Extradition and Rendition." Generic phrasing, however, would make it "International Rendition: Problems of Choice" because we are dealing with several possible methods of rendition of which extradition is but one kind and not necessarily always the preferred kind. I shall sketch these several methods with some observations about the problems which they involve.

I. Methods of Rendition

A. Formal Methods

1. Extradition

First, there are formal methods of rendition based upon treaties or statutes and following some kind of procedure established for the purpose of rendition *per se*. Extradition today finds its formal basis in treaties, bilateral or multilateral, directly concerned with the subject matter [1] or by reference where the formula "extradite or submit to prosecution" is used in certain agreements proscribing international crimes.[2] Some States permit extradition in

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1. *See, e.g.*, Extradition Treaty, Dec. 3, 1971, United States-Canada, 27 U.S.T. 983, T.I.A.S. No. 8237 (entered into force Mar. 22, 1976); European Convention on Extradition, *done* Dec. 13, 1957, 359 U.N.T.S. 273.

2. *See, e.g.*, Convention for the Suppression of Unlawful Seizure of

the absence of a treaty but pursuant to an extradition statute.[3] Extradition may also be granted as a matter of comity, usually with an implication of reciprocity. The United States historically does not seek extradition by comity because reciprocity cannot be assured in the absence of an extradition treaty [4] although instances of such requests can be cited, as in the *Orsini* case where the United States requested the extradition of an accused from Senegal, a State with which we have no extradition treaty.[5]

The extradition process is characterized and, indeed, limited by adherence to a number of established principles which constitute the customary international law on the subject. For example, there are the principles of double criminality, evidence of criminality, speciality, political defense, double jeopardy, time limit on detention, nonsurrender of nationals, and pending process against the accused in the requested State. It is also characterized by the use of judicial proceedings which in the United States are akin to the preliminary hearing in the criminal justice system. The element of judicial discretion, which characterizes the criminal justice system, is also evident here, *e.g.*, in respect of the sufficiency of evidence offered in sup-

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Aircraft (Hijacking), *done* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, — U.N.T.S. — (entered into force Oct. 14, 1971).

3. *See, e.g.*, United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962), *aff'd*, 319 F.2d 661 (2d Cir. 1963), *cert. denied*, 375 U.S. 981 (1964).

4. *See* 18 U.S.C. § 3181 (1976); 4 G.H. Hackworth, Digest of International Law 11-12 (1942); 4 J.B. Moore, Digest of International Law 253 (1906); 6 M. Whiteman, International Law Digest 737, 744 (1968).

5. *See* United States v. Orsini, 424 F. Supp. 229 (E.D.N.Y. 1976), *aff'd*, 559 F.2d 1206 (2d Cir. 1977); J. Boyd, Digest of United States Practice in International Law 1977, 443 at 446 (1979). In United States v. Salzmann, 417 F. Supp. 1139 (S.D.N.Y. 1976), the court said: "Even if the federal government lacks the legal right to demand extradition, it may be required by the due diligence clause to request surrender of the defendants." *Id.* at 1158. *See also* Fiocconi v. Attorney General, 462 F.2d 475 (2d Cir. 1972) (extradition from Italy by comity where narcotics offense not included in treaty).

port of the charges or the setting of bail.[6] In the United States the judicial proceeding is final where extradition is denied, but where extradition is recommended, the decision to surrender the accused is at the discretion of the Executive Branch, or specifically, the Secretary of State.[7] There is no requirement that the Secretary hold a hearing on his decision to order the surrender of the accused.[8] The accused, however, may have recourse to review through a habeas corpus proceeding.[9]

Whatever the procedure, the extradition process is designed to benefit the States concerned, as courts have often pointed out,[10] so that the accused is likely to find little comfort in this process, as will be noted later.

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6. *See* United States v. Williams, 611 F.2d 914 (1st Cir. 1979) (grant of bail in similar case in Second Circuit not relevant); United States v. Peltier, 585 F.2d 314 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979) (affidavit from government witness which was later repudiated and excluded from trial did not vitiate extradition, pursuant to *Ker-Frisbie* Rule); O'Brien v. Rozman, 554 F.2d 780 (6th Cir. 1977) (could introduce evidence of earlier offenses although prosecution was limited to offense described in surrender order); Beaulieu v. Hartigan, 430 F. Supp. 915 (D. Mass. 1977) (court's discretion in granting bail is more strictly construed in extradition case).

7. United States v. Robins, 27 F. Cas. 825 (D.S.C. 1979) (presidential order to court to extradite). In Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir. 1976), *cert. denied*, 429 U.S. 833 (1976), extradition was recommended. The Department of State denied extradition on several grounds, however, including the notion of "constructive flight" and the interpretation of the treaty provisions concerning the statute of limitations. E. McDowell, Digest of United States Practice in International Law 1976, at 114-15 (1977) [hereinafter cited as 1976 Digest]. *See also* Shapiro v. Secretary of State, 499 F.2d 527 (D.C. Cir. 1974) (extradition is within the "exclusive purview of the Executive" and cannot be enjoined).

8. Peroff v. Hylton, 542 F.2d 1247 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) (extradition may be denied by Executive "when strong humanitarian grounds are present").

9. Shapiro v. Secretary of State, 499 F.2d 527 (D.C. Cir. 1974) (no review by application for injunctive relief); Wacker v. Bisson, 370 F.2d 552 (5th Cir.), *cert. denied*, 387 U.S. 936 (1967) (review by declaratory judgment).

10. *See, e.g.*, Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975)

2. Brevi Manu Extradition

Another type of formal rendition may be denominated as "*brevi manu* extradition." [11] As far as the United States is concerned, this type of rendition is characterized by the presence of a treaty base. The treaty is not directed to extradition *per se*, however, hence, it does not invoke the customary international law principles of extradition. The typical example here is the return of a member of the armed forces, under a "status of forces" agreement, from the United States to the country in which criminal proceedings are either pending against the accused or in which he has been convicted and from which he has fled in order to avoid serving sentence.[12] The procedure of rendition followed by the military is on the summary side, but an accused can question an unfavorable decision through a habeas corpus proceeding.

B. Quasi-formal Rendition

1. Exclusion and Expulsion

A second method of rendition may be described as "quasi-formal" in that an established procedure is used for rendition; however, it is a procedure which was not designed for the purpose of cooperation in furthering the

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(extradition is for benefit of asylum State where irregular recovery under extradition treaty argued); Berenguer v. Vance, 473 F. Supp. 1195 (D.D.C. 1979) (speciality is the right of State, not of accused).

11. *See* F.A. Small, The Extradition of Military Deserters in International Law, at 129 (1964) (unpublished paper, Harvard Law School).

12. *See, e.g.*, Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 869 (1972) (tried in West Germany, fled to the United States and surrendered to military authorities, returned under NATO Status of Forces Agreement); Williams v. Rogers, 449 F.2d 513 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972) (transferred to United States while proceedings pending on non-service offense; Air Force must return accused under Military Bases Agreement of 1947 with Philippines); United States *ex rel.* Stone v. Robinson, 309 F. Supp. 1261 (W.D. Pa. 1970) (convicted in Japan, United States obliged to return him).

international criminal justice system. Quasi-formal methods of rendition comprehend exclusion and expulsion of aliens, both of which are civil processes, designed for immigration control, and are executive-dominated. These proceedings, which may be elaborate or summary, depending upon the country involved, are not concerned with criminal justice standards either as regards the protection of the interests of the States involved or those of the alien. In the United States, the Immigration and Naturalization Service handles the processes of exclusion and expulsion. While appeal to the federal Courts of Appeals from administrative proceedings is possible, or resort may be had to a habeas corpus proceeding, exclusion and expulsion are executive in nature. This situation is also found in other States. It has been reported that France, for example, put illegal aliens under control of the Ministry of the Interior in 1979, where formerly their cases were heard in the courts.[13]

While rendition by exclusion is somewhat less common,[14] there is no dearth of examples of rendition by expulsion by the United States and by other countries. The hijacking records are replete with instances. Essentially, aliens can be deported into sure criminal proceedings as, for example, Ireland's return of Kavaja to the United States in June 1979, where he was tried on aircraft hijacking and other charges, receiving forty years for hijacking and bond jumping and twenty years for a previous conviction for transportation of explosives and conspiracy to commit murder;[15] Mexico's return of Gray to the United States in October 1979, where trial on aircraft hijacking charges is pending;[16] France's deportation of five Croatian

13. N.Y. Times, May 31, 1979, § A, at 5, col. 1 (city ed.).

14. *See* United States v. Orsini, 424 F. Supp. 229 (E.D.N.Y. 1976); *aff'd,* 559 F.2d 1206 (2d Cir. 1977).

15. *See* OFFICE OF CIVIL AVIATION SECURITY, FEDERAL AVIATION ADMINISTRATION, DOMESTIC AND FOREIGN AIRCRAFT HIJACKINGS 81 (1980).

16. *See id.* at 86.

nationalists to the United States in 1976 where they were tried on aircraft hijacking and other charges, receiving sentences from thirty years to life;[17] Canada's deportation of Patrick McCarthy to Ireland where he was wanted for attempted murder;[18] or the U.S. deportation of Fantine to Trinidad where he was wanted for illegal possession of arms and "inflammatory literature dealing with guerrilla war."[19] Deportation is not barred where criminal proceedings are possible, or even probable, in the State of destination.[20] Presumably, deportation is done at the instance of the territorial State, but where an accused charged that the United States was "vicariously responsible" for his deportation from Chile, *i.e.*, that deportation had been ordered at the request of the U.S., the Court of Appeals for the Second Circuit observed that there was nothing unusual in intergovernmental cooperation in the return of fugitives.[21]

The significant point here is that exclusion and expulsion appear to be more commonly used for rendition than is extradition.[22] The disparity in use between extradition and

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17. *See id.* at 62.

18. *See* Ottawa (Ont.) Journal, August 5, 1978, at 5, col. 1.

19. *See* DEP'T OF JUSTICE, REPORT OF THE COMMISSIONER OF IMMIGRATION AND NATURALIZATION 1974, at 14 (1975).

20. *See, e.g.*, McCaud v. INS, 500 F.2d 355 (2d Cir. 1974) (likelihood of prosecution for escape from prison); Blazina v. Bouchard, 286 F.2d 507 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961) (likelihood of prosecution for desertion from vessel).

21. United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975). *See also* United States v. Lara, 539 F.2d 495 (5th Cir. 1976); United States v. Quesada, 512 F.2d 1043 (5th Cir. 1975).

22. It was found in a study of the rendition of 231 international terrorists over a sixteen-year period that extradition was sought in eighty-seven instances and granted in six, whereas exclusion or expulsion was used by twenty-eight States to return 145 terrorists to twenty-five different destinations. Evans, *The Apprehension and Prosecution of Offenders: Some Current Problems*, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 493, 494-95 (A. Evans & J. Murphy eds. 1978).

exclusion or expulsion suggests either that something is wrong with extradition which should be corrected or that exclusion and expulsion should be accepted as lawful alternative methods of rendition.

2. Special Arrangements

Within this same category of quasi-formal methods of rendition, there may be included "special arrangements" between two States for acquiring custody of an individual. One example is the Mutual Prosecution Assistance Agreement between the United States and South Korea for the return of Tongsun Park to the United States, to testify as a witness in a bribery case.[23] South Korea issued him a travel document for the round trip between the two countries. In 1979, the Department of State resorted to passport control as a means of forcing Philip Agee to return to the United States on the grounds that as a former CIA employee his criticisms abroad of U.S. intelligence activities were detrimental to the national security or to the foreign policy of the United States.[24] The District Court found no statutory basis for the regulation upon which the Department relied nor any substantial evidence of practice under this regulation.[25] The court did point out, however, and this point is relevant to the matter of rendition, that such revocation of a passport would be admissible where the object was the criminal conduct of the passport holder.[26]

C. Irregular Recovery of Fugitives

A third method of rendition is irregular or illegal recovery or resort to measures which are overtly, or sometimes covertly, criminal in themselves. Kidnapping is an obvious

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23. *See* J. BOYD, *supra* note 5, at 476-77 (Agreement of Dec. 30, 1977).

24. The revocation was based on 22 C.F.R. §§ 51.70(b)(4), 51.71 (1979).

25. Agee v. Vance, 483 F. Supp. 729 (D.D.C. 1980).

26. *Id.* at 732.

example.[27] Another is the use of blackmail or other inducement or pressure on the accused to return to the destination in which he is wanted on criminal charges.[28] Such measures may be undertaken on its own responsibility by the State which wants custody of the accused, as was the case on the Israeli kidnapping of Adolf Eichmann from Argentina.[29] On the other hand, it is more likely that irregular recovery would be accomplished by active cooperation between the officials of the States concerned or by passive cooperation or acquiescence by the territorial State in the incident.[30] Unless the act of irregular recovery is blatantly offensive, it is not likely to arouse sympathy in the courts, in the United States at least, given the *Ker-Frisbie* Rule,[31] *Toscanino*,[32] and P.L. 94-329[33] to the contrary notwithstanding, as the opinions in *Lira* and *Lara* indicate.[34] And the fall-back position is that the State from

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27. *See, e.g.*, N.Y. Times, Aug. 14, 1973, at 1, col. 7 (abduction of Kim Dae Jung from Tokyo to Seoul, apparently by South Korean agents).

28. *See, e.g.*, Charron v. United States, 412 F.2d 657 (9th Cir. 1969) (not allowed to land in Mexico on flight from Toronto; forced to return via Detroit; induced to leave aircraft and held under *Ker-Frisbie* Rule). In the case of Kristina Berster, who was suspected of being a member of the Baader-Meinhof gang, the accused left the United States voluntarily, thus obviating the necessity of extradition and deportation proceedings. *See* N.Y. Times, Oct. 31, 1979, § B, at 7, col. 1.

29. Attorney General v. Eichmann, [1968] 36 INT'L L. REP. 5 (Dist. Ct. Jerusalem Dec. 12, 1961, *aff'd*, Israel Sup. Ct. May 29, 1962).

30. *See, e.g.*, United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). On remand, no violation of the due process rights of the accused was found. 398 F. Supp. 916 (E.D.N.Y. 1975).

31. The rule that came out of the holdings in Ker v. Illinois, 119 U.S. 436 (1886) and in Frisbie v. Collins, 342 U.S. 519 (1952), is that, in general, a court's power to bring a person to trial upon criminal charges is not impaired by the forcible abduction of the defendant into the jurisdiction.

32. *See* note 30 *supra*.

33. Act of June 30, 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified in scattered sections of 22 U.S.C.).

34. *See* United States v. Lara, 539 F.2d 495 (5th Cir. 1976) (forcible

which the accused has been rudely removed has not protested the matter through the diplomatic channel or in the United Nations.[35]

II. Problems of Rendition

A. Choice of Method

The choice of method of rendition is basically that of the State seeking custody of the fugitive. It must weigh obvious considerations of time and expense. In addition, there is the consideration of the formal condition of relations between the requesting State and the requested State. If they do not have diplomatic relations, extradition would not be feasible; however, exclusion and expulsion would not be affected thereby, as U.S. experience with Cuba regarding the return of aircraft hijackers would suggest. If relations are strained, extradition may be denied as apparently happened in the *Wagner* case between the Federal Republic of Germany and Yugoslavia.[36] Similarly, consideration must be given to the

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abduction does not necessarily involve *Toscanino* Rule "even if that principle did apply in this Circuit"); United States v. Lira, 515 F.2d 68 (2d Cir. 1975) (no direct U.S. involvement where United States asked for expulsion from Chile). *See also* United States v. Marzano, 388 F. Supp. 906 (N.D. Ill. 1975) (removal from Grand Cayman is not abduction although U.S. agents paid the fare and accompanied defendants; existence of an extradition treaty was not relevant).

35. *See* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975) (noting that there was no protest from Argentina or Bolivia regarding alleged abduction).

Argentina complained to the Security Council about the abduction of Eichmann. The Security Council suggested that Israel "make appropriate reparation" to Argentina "in accordance with the Charter of the United Nations and the rules of international law." The incident was closed by a joint communiqué which noted "the action taken by citizens of Israel, which infringed the fundamental rights of the State of Argentina." *See* 15 U.N. SCOR, Supp. (Apr.-June 1960) 24-28, U.N. Docs. S/4334, S/4336 (1960), *id.* at 30-33, U.N. Doc. S/4342 (1960); Resolution of June 23, 1960, *id.* at 35, U.N. Doc. S/4349 (1960).

36. Yugoslavia denied extradition of four West German terrorists because West Germany denied extradition of eight Croats on the grounds

condition of mutual relations at the non-diplomatic level, *i.e.*, between law enforcement officers of the two States. If they are working in close cooperation, as, for example, in control of traffic in illegal drugs, expulsion is the more convenient choice for rendition,[37] or it may be the only choice if the States are bound by extradition treaties which do not prohibit such traffic *per se*.[38] Then there are also internal policy considerations. Extradition may be precluded by the commencement of judicial proceedings against the accused in the requested State on charges similar to those for which extradition is sought by the requesting State,[39] or it may not be desirable to resort to the more conspicuous method of extradition where the charge, *e.g.*, violation of the Selective Service Act, is politically unpopular in the requesting state; deportation, however, would be a convenient alternative here.[40] There is always the possibility that extradition will be thwarted by a court which takes up the standard for the accused, especially in regard to its interpretation of the political defense. The denial of the U.S. requests for extradition in the *Holder-Kerkow* and *McNair-Brown* aircraft hijacking cases by the Court of Appeals of Paris illustrates the point, although it should be observed that the Executive Branch took a different position when it deported the five Croatian

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that membership in the Croatian Revolutionary Brotherhood was not an extraditable offense. *See* [1978] BULL. LEGAL DEV. 259; *A Big Catch in Zagreb*, TIME, June 12, 1978, at 43, 44 [hereinafter cited as *Big Catch*].

37. *See* United States v. Richardson, 580 F.2d 946 (9th Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979) (accused deported to United States after commutation of sentences on drug charges in Guatemala and arrested here on narcotics charges; no double jeopardy as charges arose in two different jurisdictions).

38. *See, e.g.*, Fiocconi v. Attorney General, 462 F.2d 475 (2d Cir. 1972).

39. *See, e.g.*, a report on the case of Michele Sindona, N.Y. TIMES, July 7, 1979, at 28, col. 6.

40. *See, e.g.*, United States v. Salzmann, 417 F. Supp. 1139 (S.D.N.Y. 1976) (requesting State may not resort to extradition for policy reasons).

hijackers to the United States despite their alleged political motives for their act.[41]

B. Problem of Choice of Method

One of the main problems in the choice of method as between extradition and exclusion or expulsion (presumably irregular methods of rendition would not be at issue) is concern for the protection of the interests of the accused. Admittedly, extradition has not been devised primarily for this purpose, but pursuant to it, the accused does have his day in court and can raise issues of identification, double criminality, and the political character of the charges. While the first two issues do not afford the accused much advantage, the third, the political defense, can be useful. It is a usefulness which is limited, however, by the interpretation which the requested State chooses to put upon it at a given time and by the growing trend toward circumscribing the application of the political defense with respect to particular offenses. This trend can be seen in multilateral conventions proscribing international crimes, in judicial decisions, and in executive action.[42] But the

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41. *See* E. McDowell, Digest of United States Practice in International Law 1975, at 168 (1976) (Holder-Kerkow); 1976 Digest, *supra* note 7, at 124 (McNair-Brown).

42. The political defense was recently used successfully in the *Wagner* case, note 36 *supra*, and in In re McMullen, No. 3-78-1099 (N.D. Cal. May 11, 1979) (bombing United Kingdom barracks was crime incidental to uprising or political disturbance). Circumscription of the political defense is evident in the recent cases of In re Abu Eain, No. 79 M 175 (N.D. Ill. Dec. 18, 1979) (no relation between the crime and the alleged political objectives); In re Piperno, No. 1343-79 (Cour d'Appel de Paris Oct. 17, 1979) (complicity in kidnapping, detention, and murder of former Italian Premier Aldo Moro; acts not political offenses but rather acts of "odious barbarity" under 1927 Extradition Law); and In re Budlong, Nos. 199/79, 200/79 (Q.B. 1979) (burglaries directed against Internal Revenue Service and Department of Justice did not challenge government or political control of the United States, but only furthered objectives of accuseds' organization).

political defense is not being eliminated, for, if nothing else, the discretionary element in extradition proceedings will keep it viable. This latter factor was evident in two cases involving the Federal Republic of Germany. In *Pohle*, membership in a criminal organization, the Baader-Meinhof gang, did not justify the political defense either before or after the fugitive's extradition from Greece to complete his sentence in West Germany;[43] in the case of Nikola Milivevis, however, membership in the Catholic Croatian Workers Movement was deemed to be political rather than criminal, so that extradition of the accused by West Germany to Yugoslavia was denied.[44] On the other hand, France extradited Rhoodie to South Africa, and Kenya extradited Astles to Uganda, the common crime elements apparently outweighing any possible political aspects of the respective charges.[45]

In U.S. practice, there is considerable procedural protection for the alien in exclusion and expulsion cases. In both proceedings, if the alien can show that he is a refugee, the Protocol Relating to the Status of Refugees can be invoked in his defense if there is a likelihood that he might be persecuted for the destination for reasons of "race, religion, nationality, membership of a particular social group or political opinion."[46] Although this provision, together with Section 243(h) of the Immigration and Nationality Act,[47] would appear to provide a "political defense" to expulsion, the alien invoking them faces two

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43. In re Pohle, 46 BVerfGE 214 (1977), *digested in* 73 AM. J. INT'L L. 305 (1979).

44. *See Big Catch*, *supra* note 36, at 44.

45. For a report on the Rhoodie extradition, *see* N.Y. TIMES, Aug. 23, 1979, § A, at 6, col. 5. Kenya's extradition of Astles is reported in BOSTON SUNDAY GLOBE, June 10, 1979, at 36, col. 1.

46. Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, art. 33(1), 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force for the U.S. Nov. 1, 1968).

47. Immigration and Nationality Act, § 243(h), 8 U.S.C. § 1253(h) (1976 and Supp. II 1978).

obstacles to their ready use, *i.e.*, that the withholding of deportation because of prospective persecution in the destination is at the discretion of the Attorney General and that the burden of proof of prospective persecution rests on the alien. It should be noted, however, that the Protocol Relating to the Status of Refugees would not bar expulsion where the alien was found to be a "danger to . . . the security" of the territorial State; the alien could not be expelled to a destination in which he would be subject to persecution.[48]

III. Conclusion

There is an increasing concern today with the regularization of existing international criminal procedures and the development of new ones. The growing use of measures of judicial assistance and interest in the transfer of criminal proceedings and the transfer of prisoners are evidences of this trend. One may also note the emphasis upon extradition in the formula, "extradite or submit to prosecution," which appears in a number of multilateral conventions concerning international offenses and the discussions thereof in the conferences which produced these conventions.[49] In this context, the continued use of exclusion and

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48. Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, art. 33(2), 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force for the U.S. Nov. 1, 1968). Where a fugitive sought to avoid deportation from Canada to the United States by invoking the Protocol and arguing that he would be persecuted by inmates of the prison from which he had escaped were he to be returned there, the Canadian Immigration Appeals Board, ordering deportation, said: "Persecution must always stem from those in power or must be condoned by those in power." In re Thomas, 10 Imm. App. Cas. 44, 47 (Can. Imm. App. Bd. 1975).

49. *See, e.g.*, International Convention Against the Taking of Hostages, *done* Dec. 13, 1979, 34 U.N. GAOR, Annex (Agenda Item 113) 5, U.N. Doc. A/34/819 (1979); European Convention on the Suppression of Terrorism, *done* Jan. 27, 1977, Europ. T.S. No. 90; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted* Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, — U.N.T.S. — (entered into force Feb. 20, 1977);

expulsion in lieu of extradition indicates that the principles and practices of extradition are not entirely functional. If exclusion and expulsion, on the other hand, are to be regarded as acceptable alternatives to extradition, then there is a real need to develop an international minimum standard for these processes in which there will be concern for the protection of the interests of both the States involved and the person whose rendition is sought.

Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), *done* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, — U.N.T.S. —.

Bringing Terrorists To Justice — The Shifting Sands of the Political Offense Exception*

Louis G. Fields, Jr.

Extradition is the system by which the formal surrender of an accused criminal, or a fugitive offender, under the jurisdiction of one nation is made to another nation for the purpose of prosecution or punishment. The practice dates back to the Egyptian, Chinese, and Assyro-Babylonian civilizations.[1] It has become an important instrument of international cooperation among nations and an effective tool in the administration of justice.

Professor M. Cherif Bassiouni in his excellent treatise on extradition analyzes the historical development of the practice and the conflicting attitudes with respect to the nature of the obligations arising under the practice. "Hugo Grotius," he writes, "took the view [that a legal obligation existed] and held that the state of refuge should either punish the criminal or surrender him back to the state seeking his return." [2] This view is embodied in the legal maxim *aut dedere aut judicare,* which has become the heart of the several multilateral efforts to prevent and punish particular manifestations of international terrorism, *i.e.,* The Hague [3] and Montreal [4] Conventions (crimes against civil aviation),

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* The views expressed in this paper are those of the author and do not necessarily reflect those of the United States Government or the Department of State.

1. M.C. Bassiouni, International Extradition and World Public Order 1 (1974).

2. *Id.* at 6.

3. Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), *done* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, — U.N.T.S. — (entered into force Oct. 14, 1971).

4. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), *done* Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, — U.N.T.S. — (entered into force Jan. 26, 1973).

the Organization of American States [5] and United Nations [6] Conventions (crimes against internationally protected persons), the Hostages Convention,[7] the European Convention Against Terrorism [8] and the Bonn Declaration.[9]

Declan Costello, former Attorney General of Ireland, has reflected on the relationship between this principle and the effort to solve the problems of terrorism on a worldwide basis. In the context of Northern Irish terrorism, he wrote in 1975:

> Acts of terrorism associated with the conflict have not been confined to the area of the Six Counties of Northern Ireland, nor have the consequences of the violence been limited to that area. Acts of terrorism by members of organizations connected with the violence in Northern Ireland have taken place both in the Republic of Ireland and in Great Britain. Persons guilty of acts of terrorism can move with comparative ease into both Great Britain and the Republic of Ireland. Attempts to extradite alleged offenders have been resisted by pleas that the offense with which the accused was charged was a "political offence or an offence connected with a political offence." The solutions offered are of interest not merely because they afford another example of the application of the principle *aut dedere aut judicare*, but also because they contain measures for the detailed implementation of the principle which could be of relevance elsewhere.[10]

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5. Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons, *done* Feb. 2, 1971, [1971] O.A.S. T.S. No. 37, O.A.S. Doc. OEA/Ser.A/17.

6. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted* Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, — U.N.T.S. — (entered into force Feb. 20, 1977).

7. International Convention Against the Taking of Hostages, *done* Dec. 13, 1979, 34 U.N. GAOR, Annex (Agenda Item 113) 5, U.N. Doc. A/34/819 (1979).

8. European Convention on the Suppression of Terrorism, *done* Jan. 27, 1977, Europ. T.S. No. 90.

9. Bonn Declaration (Joint Statement on International Terrorism), *done* July 17, 1978, *reprinted in* 78 DEP'T STATE BULL. 5 (Sept. 1978).

10. Costello, *International Terrorism and the Development of the*

While the principle of *aut dedere aut judicare* does, as suggested by Attorney General Costello, hold some promise in the worldwide struggle against terrorism, it is, in practice, not always an immutable guarantee that accused terrorists will ultimately be prosecuted for their acts. The political character of most acts of terrorism has legal implications under prevailing extradition arrangements, both bilateral and multilateral. The traditional political offense exception found in almost every extradition treaty and convention can be invoked to frustrate the extradition process.

The Committee of Ministers of the Council of Europe adopted a significant resolution on international terrorism at its 53rd Session on January 24, 1974.[11] This resolution became a turning point in the approach to the political offense exception within this important regional constituency. That resolution notes in its preambular language that the Committee of Ministers is "[c]onvinced that . . . the political motive alleged by the authors of certain acts of terrorism should not have as a result that they are neither extradited nor punished. . . ." [12] It calls upon Member States to consider decisions on extradition requests for alleged perpetrators of certain terrorist acts with due regard to the severity of that act, the collective danger to life and liberty, especially of innocent persons, and the cruel or vicious means employed in its commission. If extradition is refused, the resolution calls upon Member States, consistent with their national laws, to submit the case for prosecution to their competent authorities.

The European Convention on the Suppression of Terrorism [13] was the outgrowth of this resolution of the

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Principle Aut Dedere Aut Judicare, 10 J. INT'L L. & ECON. 483, 497 (1975) (footnotes omitted).

11. Res. (74)3, *adopted* Jan. 24, 1974, *reprinted in* Council of Europe, Explanatory report on the European Convention on the Suppression of Terrorism, at 29 app. (Jan. 27, 1977) [hereinafter cited as Explanatory report].

12. *Id.* preamble.

13. European Convention on the Suppression of Terrorism, *done* Jan. 27, 1977, Europ. T.S. No. 90.

Committee of Ministers. It was adopted by the Council of Europe on January 27, 1977, and its preamble notes "the growing concern caused by the increase in acts of terrorism" and reflects the desire of the Council "to take effective measures to ensure that the perpetrators of such acts do not escape prosecution and punishment."[14] The Convention relies essentially on the *aut dedere aut judicare* principle to achieve this objective. It purports to "depoliticize" the offenses in Article 1, *i.e.*, aircraft hijacking and sabotage, acts against internationally protected persons, hostage-taking and use of bombs, grenades, rockets, automatic firearms or letter/parcel bombs in the commission of offenses. These are the crimes which have become the *modus operandi* of the contemporary terrorist.

The fact that the Council of Europe adopted this Convention demonstrates the problem of the "political offense" in European efforts to suppress terrorism. The official Council of Europe report on the Convention reflects the strongly held view of the Council that "extradition is a particularly effective measure for combating terrorism."[15] It recognizes, however, that "terrorist acts might be considered 'political offences', and it is a principle — laid down in most existing extradition treaties as well as in the European Convention on Extradition (*cf.* Article 3 paragraph 1) — that extradition shall not be granted in respect of a political offence."[16] The Report avers to the fact that "there is no generally accepted definition of the term 'political offence' " and that "[i]t is for the requested State to interpret it."[17]

The Report suggests that "the Convention reflects the consensus which reconciles the arguments put forward in favour of an obligation, on the one hand, and an option, on the other hand, not to consider, for the purposes of application of the Convention, certain offences as political."[18]

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14. *Id.* preamble.
15. *Explanatory report*, *supra* note 11, at 7.
16. *Id.* at 7.
17. *Id.*
18. *Id.* at 8.

Although the Convention obliges a Contracting State to extradite an alleged offender found in its territory, it allows a Contracting State to declare by a reservation that it retains the right to refuse extradition of such an offender if it considers his offense to be a political offense or one connected with a political offense.[19] Moreover, Article 5 permits the requested State to deny extradition if it has "substantial grounds for believing that the request for extradition . . . has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons." [20]

The political offense exception appears to be the Achilles' heel to the international resolve to bring terrorists to justice. While the European Convention attempts to ameliorate this vulnerability, it falls short. The Article 5 discretion to determine whether an offense is one of a political character may, in effect, benefit the terrorist if a requested State uses that discretion to opt in favor of an expedient prosecution (required under Article 7) rather than extradition. While scrupulously honoring the maxim *aut dedere aut judicare,* this approach could indeed frustrate the ends of justice.

The difficulties confronting the European Community in grappling with the political offense exception in the context of its struggle against contemporary terrorism are not unlike those encountered within our own judicial system. The assertion of the political offense exception was relatively rare in our extradition experience. Modern terrorism, often committed in the name of the political cause or under the banner of a politically oriented group, has changed this situation and created the same dilemma for United States courts that it has for foreign governments and courts in dealing with this new breed of criminality. The inherent problem is the lack of generally accepted definitions for

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19. European Convention for the Suppression of Terrorism, *done* Jan. 27, 1977, art. 13, Europ. T.S. No. 90.

20. *Id.* art. 5.

"terrorism" and the "political offense." The current cliché "one man's terrorism is another man's heroism" simplistically suggests the reason behind the lack of consensus on a definition. Furthermore, the political overtones or underpinnings of the majority of acts of terrorism have produced many ambiguities in State and judicial practice in applying the political offense exception. This situation has led courts both here and abroad into *ad hoc* approaches to definitions, tailored to meet the needs of particular cases.

II. The U.S. Case Law

A. The McMullen Case

On May 11, 1979, U.S. Magistrate Frederick J. Woelflen [21] held that Peter Gabriel John McMullen, an accused Irish terrorist, was not extraditable to Great Britain under the provisions of the extradition treaty in force between the United States and the United Kingdom as of the date of the offense (1974) for which his extradition was sought.[22]

The facts of the case reveal that McMullen, a deserter from the British Army, joined the Provisional Wing of the Irish Republic Army (PIRA) and took part in the bombing of Claro Barracks in Great Britain. The Magistrate found that "an insurrection and a disruptive uprising of a political nature did, in fact, existed [*sic*] in Northern Ireland in 1970 and particularly in 1974, when Mr. McMullen is charged with the crimes against Claro Barracks, a British Army installation." [23] Determination of the existence of a political conflict, he held, is "one of the steps necessary in the application of the political exception defense." [24]

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21. Magistrate for U.S. District Court, Northern District of California.
22. In re McMullen, No. 3-78-1099 (N.D. Cal. May 11, 1979).
23. *Id.* at 4.
24. *Id.*

The Magistrate next turned to the crime itself and found that McMullen "acted as a member of PIRA, his activities were directed by . . . the PIRA, and that the bombing was a crime incidental to and formed part of a political disturbance, uprising or insurrection and in furtherance thereof." [25]

The Magistrate's ruling, from which the government may not appeal,[26] has caused deep concern to those charged with administering the U.S. program to combat terrorism. Magistrate Woelflen's memorandum opinion points to the Government's failure "to offer evidence that contradicts circumstances or activities which make the political exception applicable." [27] There is a traditional reticence on the part of the Government to produce official witnesses to testify to the position of the government with respect to the character of an offense in an extradition proceeding. Clearly, contemporary terrorism — and the *McMullen* case — has necessitated a reassessment of this traditional view.

B. The Abu Eain Case

Ziyad Abu Eain, a young Jordanian resident of the West Bank, was provisionally arrested in Chicago on August 21, 1979, at the request of the Israeli government, under the U.S.-Israel Extradition Treaty. This incident [28] brought the issue of the political offense exception once again before a U.S. Magistrate. Abu Eain was charged with murdering two Israeli youths and causing bodily harm, with aggravating intent, to thirty-six persons. The crimes were alleged to have been committed by the delayed detonation

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25. *Id.* at 6.

26. FED. R. CRIM. P. 5.1(b).

27. In re McMullen, No. 3-78-1099, slip op. at 6 (N.D. Cal. May 11, 1979).

28. Convention on Extradition, Dec. 10, 1962, United States-Israel, 14 U.S.T. 1707, T.I.A.S. No. 5476, 484 U.N.T.S. 283 (entered into force Dec. 5, 1963).

of an explosive device placed in a trash bin in a public market place in Tiberias, Israel on May 14, 1979. The accused was implicated in the act by a co-conspirator and charged under an information filed in the District Court of Tel Aviv-Jaffe, an ordinary Civil Court in Israel.

In his defense at the extradition hearing before U.S. Magistrate Olga Jurco, he asserted the political offense exception, citing the "political conflict between the government of . . . Israel and the several Arab States and the People of Palestine." [29] The defense produced lay and expert witnesses to establish the existence of such a conflict, the recruitment of Abu Eain into the Palestine Liberation Organization (PLO), and his motivation in the commission of the acts charged. This strategy was intended to demonstrate that those acts were "of a political character" and, therefore, exempted from the operation of the U.S.-Israel Extradition Treaty pursuant to Article VI.[30]

The author, under the authority of the Department of State, appeared as a government witness to testify to the position of the Department regarding the character of the

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29. In re Abu Eain, No. 79 M 175 (N.D. Ill.), Transcript Record for Sept. 27, 1979, at 271.

Counsel for Abu Eain requested the Magistrate to take judicial notice of the fact

> [t]hat there is now and has existed for more than three decades, a military and political conflict between the Government of the State of Israel and the several Arab states and the people of Palestine.

The Magistrate refused to take such judicial notice because such notice can be taken "only of those matters generally known [to be] within the territorial jurisdiction of the trial court, or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned (cf. Ev. Rule 201(b))." In re Abu Eain, No. 79 M 175, slip op. at 13-14 (N.D. Ill. Dec. 18, 1979).

30. Convention on Extradition, Dec. 10, 1962, United States-Israel, art. VI(4), 14 U.S.T. 1707, T.I.A.S. No. 5476, 484 U.N.T.S. 283 (entered into force Dec. 5, 1963).

offense.[31] The crux of that testimony is found in the following excerpt from the original transcript of the Magistrate's hearing:

By MR. SULLIVAN [U.S. Attorney Thomas P. Sullivan]:

Q. Mr. Fields, does the United States Department of State regard the offense described in Government Exhibits 1, 2 and 3 [Israeli extradition documents] as one of a political character?

A. It does not.

Q. And how does the Government regard that offense?

A. As a common crime.[32]

. . . .

Q. . . . Will you please state the reasons for the answers you just gave, namely, that the Department of State regards the act described in [the Israeli extradition documents] as common criminal acts [*sic*] and not as an offense of a political character?

A. . . . It is the view of the Department of State that the indiscriminate use of violence against civilian populations, innocent parties, is a prohibited act and, as such, is a common crime of murder. And it is punishable in both states.[33]

The testimony of the government witness was strenuously opposed by defense counsel on the ground that "decisional law of the Courts of the United States . . . holds that (the question of determining the political character of a crime) is a matter solely within the competence of the Courts and . . . the political position of the State Department of the Executive Branch is of no concern in making that decision."[34] Principal reliance for support of this posi-

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31. On the subject of proving international law by the testimony of expert witnesses, *see* Baade, *Proving Foreign and International Law in Domestic Tribunals,* 18 VA. J. INT'L L. 619 (1978).

32. In re Abu Eain, No. 79 M 175 (N.D. Ill.), Transcript Record for Oct. 10, 1979, at 1038.

33. *Id.* at 1040-41.

34. *Id.* at 910.

tion was rested upon the following excerpt from Magistrate Woelflen's opinion in the *McMullen* case:

> We do not look to the Executive arm of the government, particularly the State Department for a determination as [to] what this government considers as an act of political defense relative to criminal activity occurring on the soil of a foreign nation.[35]

It was Magistrate Woelflen's conclusion that judicial precedents governed such a decision.

Magistrate Jurco did not follow her California colleague on this point and took testimony from the Department of State's witness regarding the Department's position on the nature of the offenses charged in the extradition request. She observed that Abu Eain had been given the opportunity to present evidence bearing upon his interpretation of Article 6(4) of the Treaty and, therefore, that the government of the United States must be accorded its opportunity in rebuttal.

In seven days of hearings, Magistrate Jurco received in evidence thirty-five exhibits, heard testimony from a broad spectrum of witnesses, and considered extensive pre-trial briefs and oral arguments. She scrupulously restricted evidence which tended to preempt issues considered to be within the province of the court. An excellent example of her view on this point is found in her ruling on an objection to a defense question to the Department of State's witness which attempted to elicit whether the Department had considered "the existence of a political conflict in the Middle East"[36] in reaching its position on the character of Abu Eain's offenses. The Magistrate stated:

> I have, indeed, received the testimony of Mr. Fields in order to be provided with knowledge of what the requesting party's attitude is with regard to this of-

35. *Id.* at 909 (quoting In re McMullen, No. 3-78-1099, slip op. at 3 (N.D. Cal. May 11, 1979)).

36. *Id.* at 1077.

fense. And while I have permitted great leeway in connection with the response that was made by Mr. Fields yesterday, I think we are approaching a matter which is again left to me for the facts, balanced upon whatever weight I may give it, if any, on what had previously been testified to by this witness.

This is an ultimate fact which is mine. And the weight of the evidence, such as it is, and has been presented, will be taken and balanced with regard to the determination that I make.

Whether or not this witness, as a Department of State official, regarded it as political character, I think is encompassed within the answer that he gave yesterday. They regard it as a common crime was his response.

I do not want to go into the aspects of all of the minutia of what constituted political character or what they regarded as political character.

I am going to sustain the objection, because I feel that that is my decision.[37]

On December 18, 1979, Magistrate Jurco certified to the Secretary of State that there was sufficient evidence to sustain the charge against Abu Eain set forward in the extradition request and that the offenses charged are not political in character so as to prevent extradition under the Treaty. Her memorandum opinion,[38] annexed to her certification, contains the following analysis to the evidence on the question of the political character of the offenses charged and, since it otherwise would not be publicized, deserves quotation here at length: "The accused presented evidence to show that the offenses, if committed by him, are offenses which are 'political in character.' Evidence was received which sought to explain and clarify the nature of the conflict in the Middle East before, during and after the 1948 proclamation of a State of Israel. . . .

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37. *Id.* at 1079-80.

38. In re Abu Eain, No. 79 M 175 (N.D. Ill. Dec. 18, 1979).

"A relative political offense is one, which standing alone, is a common crime, but if it is connected with a civil war or other similar disturbance it becomes a political offense for purpose of avoiding extradition. The accused's evidence is directed to show that these offenses, if committed by the accused, come within the category of political offenses. Professor [William Thomas] Mallison also described a political offense as an offense committed for the purpose of changing the governmental structure. It was his opinion that there was and is a state of war since 1948 in Israel or that there exists an insurrection in Israel; that the conflict in the Middle East is a political and military conflict and that the purpose of the P.L.O. is to alter the governmental structure in Israel and Palestine. He also testified that noncombatants have a different relationship to enemy power and that direct attacks on civilians are unlawful notwithstanding the perpetrator's identity.

"The testimony of Mayor Qawasmeh of Hebron, Jordan, and that of Ms. Johnson, former State Department vice-consul in [the] City of Jerusalem, described the manner and condition of Arab life in the occupied West Bank of Jordan. It was elicited from these witnesses that the occupied West Bank is governed through Israeli military governors; that there is freedom of election exercised by West Bank Arabs in local self-government and no Israeli votes in such election; that there are civil courts with Arab judges; that Jordanian law is applied in the West Bank; that freedom of movement is generally permitted but there are also restrictions and in certain areas person[s] and property are subject to search; that membership in certain organizations is subject to arrest and punishment in Israeli military tribunals; that expropriation of land and seizure of property occurs for commission of certain acts and crimes; that there is resistance to Israeli occupation of the West Bank; that the P.L.O. is the representative for the Arabs. The evidence also showed that the demography of Israel and the West Bank of Jordan has altered considerably in that there

has been a great increase in the area of the Jewish population; that this is due to dedication to Zionist principles in the creation of Israel establishing national rights for Jews; that the Palestinian Arabs do not consider they are citizens of the country of Jordan and do not want citizenship there.

"Counsel for accused states the political program of Fatah is directed to 'creating a "democratic non-sectarian state" in place of the present State of Israel; and resisting Israeli occupation of Palestinian land.' The accused emphasizes that the P.L.O. has received recognition as the legitimate representative for the Palestinian-Arabs in the United Nations, is an official observer in that body and has been recognized by other organizations and countries. He calls attention to the concern of the world community of nations through the Geneva Convention and United Nations resolutions for adherence to humanitarian considerations to be given by Israel to Palestinian-Arab refugees in the occupied West Bank of Jordan. Exhibits have been received in evidence dealing with such concern.

"The government regards all of the accused's evidence to be irrelevant. It urges that because the offenses involved the death and injury of innocent victims, it is an act of terrorism, and further, under any theory of 'offense of political character,' parties who are the target victims must be considered. The accused sought discovery as to the status of those who were killed and injured; it was denied. It was the testimony of Louis Fields, appearing as the authorized spokesman for the Department of State, and who is Legal Adviser [*sic*] for the Department of State, that the offenses described in Government Exhibits 1 through 3 are viewed by the Department of State as common crimes and not offenses of political character, because 'it was indiscriminate use of violence against civilian populations, innocent parties.'

"In evaluating the nature of the offenses, various scholars on the subject of political offenses have delineated certain tests to assist in the determination. Among these are the

following: (1) the offender's past participation and involvement with a political movement and his personal beliefs as tied to a political motive; (2) existence of a connection or link between the crime and political objective; (3) relation or proportion between the crime and its method of commission and the political objective.

"The accused refers to the Statement of Yasin to show his political motivation in that they talked politics and he agreed to enlist in the Fatah organization. There next must be shown a connection between the crime and the political objective of Fatah and the P.L.O. The statement of Yasin shows he wished to carry out an attack on May 14, that the date was a Monday, not a Tuesday, as he had thought; that the attack was to put 'the explosive charge in a refuse bin in Tiberias; it did not matter what refuse bin,' that he admonished the accused not to go near an army vehicle. The target is not otherwise described. . . . Government's evidence shows that on May 14, two young Jewish males were killed and thirty-six other persons were injured and hospitalized; that Tiberias is a sea resort town located on the Sea of Galilee, which had been a part of the State of Israel since 1948; Government Exhibits 2 and 3 show the explosive was placed in a public place, near a bus stop on Galil Street in the market square in Tiberias, Israel. The accused seeks shelter in the history and evidence of Israeli-Arab conflict and in the existence of the P.L.O. as his political motivation to kill and injure; in other words, he seeks to equate the actions of violence as political because he is a member of an organization which acts for and on behalf of the P.L.O. Counsel for accused urges that evidence of the conflict and turbulence between Israel and the Palestinian-Arabs, the existence of the P.L.O. as the central representative for the Palestinian-Arabs, and the tactics of the P.L.O. in achieving its political objective, 'tend' to show his alleged offenses were political offenses; that the burden now shifts to the government to show otherwise and it has failed to show that innocent civilians were killed and

injured. That argument overlooks a significant issue — that it is [the] accused whose acts are subject to scrutiny; he must show the link between the crimes he allegedly committed and their relation to the political objective. Exemption of relative political crimes exists only where such crimes are directed against the political organization of the State. The achievement of that political objective has not been linked to the means used and the target involved. The evidence shows a random selection of the locale; a locale where a Youth Rally and religious festival was being held in Tiberias, Israel. Defendant's argument seeks to lead to a conclusion that every Israeli present in Tiberias is in the military service of his country and therefore cannot be regarded as a civilian; that a violent act by a Palestinian-Arab against an Israeli comes within the political offense exception.

"Accepting that defendant was a member of a P.L.O. organization and with motivation toward its political objective, there is nothing in the evidence which 'tends' to show that this act was directed in opposition to the State of Israel and that the crime furthered the cause of his group objective. He has not shown the relation between these crimes, the method of their commission and the political objective. The random and indiscriminate placing of an explosive near a bus stop on a public street in any trash bin defuses any theory that the target was a military one or justified by any military necessity. It was an isolated act of violence. The commission of these alleged offenses is so remote from the political objective that it could not reasonably have been believed by the offender to have a direct political effect on the government of Israel; nor was it directed at the government of Israel.

"The accused has failed to present evidence establishing, or even tending to establish, that the nature and the circumstances of the commission of the common crimes of

murder and causing bodily injury with aggravating intent are such as to make such crimes as offenses of a political character." [39]

Abu Eain petitioned the United States District Court for a writ of habeas corpus on December 29, 1979. After the refusal of two judges, the case was assigned to Judge Frank McGarr, who denied the petition on March 28, 1980.[40] In a memorandum opinion, Judge McGarr adopted and appended the Magistrate's "detailed memorandum opinion" [41] and addressed, in pertinent part, the political offense issue, as follows:

> Petitioner next argues that the alleged offense is of a political character and, pursuant to Article VI of the treaty, is not an extraditable offense. The magistrate, properly admitting probative evidence on the issue and properly exclud[ing] other proffered evidence, and applying appropriate legal standards, found that the alleged offense was not of a political character. The finding is based on competent evidence and is the result of the application of properly legal standards.[42]

An appeal from Judge McGarr's order has been filed with the United States Court of Appeals for the Seventh Circuit.

III. The Evolving International Attitude

The *McMullen* and *Abu Eain* cases are among the first to deal with the political offense exception in the context of contemporary terrorism, and each reached a different result. Both cases involved the use of bombs in the commission of the respective crimes. In the *McMullen* case the target was a military barracks, situated in the British Isles,

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39. *Id.* at 14-21.

40. Abu Eain v. Adams, No. 79 C 5477 (N.D. Ill. Mar. 28, 1980) (order denying habeas corpus).

41. *Id.* at 1.

42. *Id.* at 3.

remote from the site of the civil disturbance or uprising (Northern Ireland), whereas the target in the *Abu Eain* case was a public market place in Israel, which is engaged in an armed conflict with certain neighboring Arab States. These crimes are generally regarded as acts of terrorism and the offenses were so represented to the respective Magistrates.

The *McMullen* decision found the "political offense crime" to be incidental to "a political disturbance and committed as furthering a political uprising" based upon evidence showing that "highly placed officials in the British government" admitted that there was an insurrection in Northern Ireland.[43] Taking the existence of the political uprising together with McMullen's service as a PIRA member, the Magistrate found no difficulty in extending the "disruptive uprising of a political nature" across the Irish Sea to Great Britain.

On the other hand, in the *Abu Eain* case Magistrate Jurco decided that, even accepting the defendant's membership in a Palestinian organization (AL FATAH) which could have motivated his crime, there was nothing in the evidence which tended to show that his act was directed against the State of Israel or that his crime furthered the cause of his group objective. She ruled that Abu Eain's crime was "so remote from the political objective that it could not reasonably have been believed by the offender to have a direct political effect on the government of Israel; nor was it directed at the government." [44]

Both Magistrates described the respective offenses as being "deplorable and heinous" and "actions of violence." Each, however, attached a different degree of significance to affiliation with a politically oriented terrorist group and the

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43. In re McMullen, No. 3-78-1099, slip op. at 3 (N.D. Cal. May 11, 1979).

44. In re Abu Eain, No. 79 M 175, slip op. at 20-21 (N.D. Ill. Dec. 18, 1979).

linkage between the act, the motive, and the political disturbance alleged in the respective cases. The result, therefore, in the *Abu Eain* case appears clearly to be more in line with the evolving international attitude towards acts of violence commonly associated with the contemporary terrorist.

Many States now regard terrorism, its political motivation notwithstanding, as not falling within the political offense exception. Recent court decisions such as that of the Supreme Court of Greece in the *Pohle* extradition case [45] reflect this trend. The court adopted "a very narrow definition of a political crime, taking it to cover only actions aiming directly at overthrowing the existing system, not all those prompted by political ideas or motives." [46]

Two recent companion cases decided in France also reflect this growing trend. The Paris Court of Appeals acting on an Italian request for the extradition of Francesco Piperno and Lanfranco Pace (two Italian fugitives implicated in the brutal kidnap-murder of Aldo Moro) held these two accused terrorists to be extraditable.[47] Both Piperno and Pace sought exemption from extradition on the ground that their crimes were political in nature. The French court found the charges (kidnapping and murder) to be "undeniably ordinary law crimes", pointing out that:

> However, the court cannot deny the fact that these crimes could be placed in a political context, allowing the defense to invoke, on a subsidiary level, their political nature and to request the court to reject the request for Pace's extradition.[48]

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45. In re Rolfe Pohle, Wash. Post, Oct. 4, 1976, § A at 24, col. 1 (Sup. Ct. Athens, Oct. 1, 1976).

46. For a discussion of the *Pohle* decision and the relevant provisions of Greek law, *see* P. TSILAS, EXTRADITION UNDER GREEK LAW: THE ROLFE POHLE CASE (Library of Congress, 1977).

47. In re Pace, No. 1402-79 (Cour d'Appel de Paris Nov. 7, 1979); In re Piperno, No. 1343-79 (Cour d'Appel de Paris Oct. 17, 1979). *See* the article by Carbonneau, at pp. 66-89 of this text.

48. In re Pace, No. 1402-79 (Cour d'Appel de Paris Nov. 7, 1979). Official Department of State Translation, LS No. 95709, at 13.

Despite the political context, the court noted the "extreme seriousness of the charges" involving the murder of "an innocent person held against his will" and concluded:

> Whatever the purpose of such acts and regardless of the context in which they might be placed, they may not, in view of their seriousness, be considered political in nature.[49]

These cases demonstrate unequivocally that courts are beginning to take the view that the political offense exception does not encompass all terrorist acts, especially acts involving innocent persons. These developments might well portend the emergence of a nascent rule of international law on the political offense exception, giving rise to hope that violent crimes directed against or affecting innocent persons will become "off limits" to the terrorists of the world. The conventions cited previously and the emerging judicial approach to the political offense exception seem to indicate the evolution of a doctrine along these lines. Indeed, we can conclude that the sands of the political offense exception are definitely shifting away from the terrorist who seeks to cloak his heinous act with the robe of political justification.

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49. In re Pace, No. 1402-79, extract of minutes of the Secretariat at 12 (Cour d'Appel de Paris Nov. 7, 1979). Official Department of State Translation, LS No. 95709, at 14.

Constitutional Limits on International Rendition of Criminal Suspects

*Paul B. Stephan III**

Whether the activity be terrorism, drug smuggling, or simple flight from justice, the criminal who crosses national boundaries has become an increasing problem for law enforcement authorities. In addition to the practical difficulties presented by the international fugitive, a variety of legal obstacles may prevent his quick capture and rendition.[1] In particular, when the United States seeks to obtain custody of criminal suspects who have fled its jurisdiction, the U.S. Constitution may set absolute limits on the means by which custody can be acquired. Courts in the United States are only just beginning to explore these limits and, as one might expect of tentative first steps, have slighted critical issues that the cases have presented.

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1. "Rendition" encompasses both extradition and irregular recovery of fugitives. Extradition is a formal method of international rendition, typically based upon a treaty by which persons charged with, or convicted of, crimes against the law of a State and found in a foreign State are returned by the latter to the former for trial or punishment. 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 727 (1968). A fugitive can be delivered from one State to another through the discretion of the former State under the principle of comity, *cf.* United States v. Rauscher, 119 U.S. 407, 412 (1886) or through other, irregular methods. Rendition accomplished through these latter methods often includes the use of illegal measures such as kidnapping. For a discussion of illegal recovery, see 4 J.B. MOORE, INTERNATIONAL LAW DIGEST 328-32 (1906). For a gen-

In charting the development of these constitutional limits, three questions deserve more careful analysis. First, who enjoys constitutional protection — everyone affected by governmental action or only those who possess citizenship or some other substantial connection with the United States? Second, with respect to those who are protected, what actions does the Constitution forbid? Finally, given that certain persons may claim protection against the occurrence of certain governmental actions, what remedies are available? This article is intended as an initial attempt at resolving these fundamental issues.

Several preliminary points are in order. First, the focus of this article is on the relationship between the federal government and the individual. Accordingly, constitutional issues concerning the allocation of powers between the President and the Congress or between the federal government and the several states are not addressed. Moreover, limitations which have been, or could be, imposed by the political branches as a matter of choice, are also outside the scope of this analysis. Thus the paradigm for this discussion is an attempt by an individual to seek redress in the courts for an alleged violation of his constitutional rights.

Second, it is crucial to this analysis that one distinguish between that which is compelled by the Constitution and that which is desirable as a matter of social policy. Many rules that might be important, fundamental, or even necessary to the existence of a just society nonetheless may not be constitutionally required. Rather, because the U.S. constitutional law system contains a judicially imposed set of safeguards against actions by the democratically selected branches of government, individual rights may be elevated to the status of constitutional guarantees only where their definition and enforcement appropriately may be consigned to the paramount authority of unelected, life-tenured, polit-

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eral discussion of rendition, *see* Evans, *Acquisition of Custody over the International Fugitive Offender — Alternatives to Extradition: A Survey of United States Practice*, 40 BRIT. Y.B. INT'L L. 77 (1966).

ically sequestered judges.[2] In asking what should be the constitutional limits on international rendition, then, the ultimate question remains not which rules might best fulfill the policy objectives of our nation, but rather which rules warrant judicial imposition in the face of executive or legislative opposition.

I. Who Enjoys Constitutional Protection?

In the growing number of constitutional challenges to particular instances of international rendition,[3] a common factual pattern has emerged. The criminal accused usually contends that U.S. law enforcement officials, with or without the connivance of local authorities, arranged for his forcible abduction from a place of refuge, supervised his interrogation (often accomplished through torture), drugged him into a state of submission, and then transported him against his will into the United States. In many of these cases, the accused is a foreign national pos-

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2. This, at least, is the consensus of the most distinguished efforts to address the problems posed by judicial power in democratic government. Unanimity, of course, does not exist. On the jurisprudence of judicial review, see generally A. Bickel, The Supreme Court and the Idea of Progress (1970); J. Ely, Democracy and Distrust: A Theory of Judicial Review (1980); Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

3. Technological growth in recent years accounts, at least in part, for the increase in the number of crimes having effects in more than one State. Hijacking, kidnapping, drug smuggling, and terrorism are key examples of crimes in which criminal fugitives are likely to cross national boundaries either during or after the commission of crimes. *See* Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 Harv. Int'l L.J. 61, 80 (1979). In response to this increase in international criminal activity, there has been a corresponding increase in attempts by the United States to bring fugitives to trial in U.S. courts. *See* cases cited in note 4 *infra*.

sessing no substantial affiliation with the United States.[4]

Perhaps because of the unattractiveness of the alleged government conduct, courts have tended either to slight or to ignore the analytically essential initial inquiry: Does the accused have any rights to assert?[5] It is clear that the Constitution protects citizens when the federal government acts against them abroad.[6] Permanent resident aliens or other foreign nationals possessing substantial ties with the United States also may be able to claim constitutional protection when the government acts outside the boundaries of

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4. *See, e.g.*, United States v. Sorren, 605 F.2d 1211 (1st Cir. 1979); United States v. Lopez, 542 F.2d 283 (5th Cir. 1976); United States v. Lara, 539 F.2d 495 (5th Cir. 1976); United States v. Marzano, 537 F.2d 257 (7th Cir.), *cert. denied*, 429 U.S. 1038 (1976); United States v. Lovato, 520 F.2d 1270 (9th Cir.), *cert. denied*, 423 U.S. 985 (1975); United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975); United States v. Quesada, 512 F.2d 1043 (5th Cir.), *cert. denied*, 423 U.S. 946 (1975); United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); United States v. Herrera, 504 F.2d 859 (5th Cir. 1974); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). A variant on this factual pattern involves an allegedly unprovoked boarding of a foreign vessel on the high seas by U.S. officials. *See, e.g.*, United States v. Williams, 617 F.2d 1063 (5th Cir. 1980); United States v. Rubies, 612 F.2d 397 (9th Cir. 1979); United States v. Postal, 589 F.2d 862 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); United States v. Cortes, 588 F.2d 106 (5th Cir. 1979); United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978); United States v. Odneal, 565 F.2d 598 (9th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978); United States v. Winter, 509 F.2d 975 (5th Cir. 1975). *See also* United States v. Tiede, 86 F.R.D. 227 (Berlin 1979) (constitutional rights of aliens on trial in West Berlin before United States judge).

5. Some courts have treated this as a standing problem. *See, e.g.*, Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 152 (D.D.C. 1976). As the Supreme Court recently has recognized, a standing discussion does not materially advance inquiry into the issue of whether a person has a proper constitutional claim of this nature. A better analysis of the issue is achieved by "simply recognizing it as one involving the substantive question of whether or not the proponent of the . . . [constitutional claim] has had his own . . . [constitutional] rights infringed . . . ." Rakas v. Illinois, 439 U.S. 128, 133 (1978).

6. Reid v. Covert, 354 U.S. 1 (1957).

the United States.[7] With respect to foreign nationals lacking such an affiliation, however, the existence of constitutional limits on extraterritorial governmental acts is more doubtful.

It is beyond cavil that "[t]he Constitution is in force . . . wherever and whenever the sovereign power of that government is exerted." [8] But it does not follow that the Constitution, by being "in force," imposes the same rules in every time and place, for it "contains grants of power, and limitations which, in the nature of things, are not always and everywhere applicable. . . ." [9] Thus, while aliens enjoy some constitutional protection in the United States, it does not necessarily follow that they enjoy the same protection with respect to federal governmental activities abroad.

Although the Supreme Court has not acted often in this area, its decisions suggest that the Constitution does not limit the United States when the government acts against foreign nationals overseas.[10] In *Johnson v. Eisentrager*,[11]

7. *See* Kwong Hai Chew v. Colding, 344 U.S. 590, 596-97 n.5 (1953).

As the Supreme Court has recognized, *see* Nyquist v. Mauclet, 432 U.S. 1 (1977), the term "alien" describes a category of individuals whose connection with, and allegiance to, the United States varies widely. For example, permanent resident aliens arguably could be considered, at least in some cases, the functional equivalent of citizens. Other aliens, of course, may have no connection at all. For the purposes of this article, the terms "foreign nationals" and "aliens" refer to those persons who owe a primary allegiance to a sovereign other than the United States and lack a substantial affiliation with the United States. Whether noncitizens, *e.g.*, permanent resident aliens, who have close ties to the United States, enjoy constitutional protection overseas is beyond the scope of this discussion. Accordingly, what type of affiliation is necessary to trigger constitutional protection also is not addressed here.

8. Balzac v. Porto Rico, 258 U.S. 298, 312 (1922).

9. *Id.*

10. The Constitution may limit the United States in the manner in which it acts against foreign States. For example, it prescribes a proce-

11. 339 U.S. 763 (1950).

German nationals held overseas by U.S. military authorities sought to challenge their continued detention. The Court ordered the suit dismissed. After surveying the judicially established rights of aliens within the United States, the majority opinion observed: "But in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." [12] Creation of similar rights in overseas aliens would be truly remarkable:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. . . . None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.[13]

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dure that must be followed before the United States can declare war against another State, U.S. CONST. art. I, § 8, cl. 11, or conclude a treaty, *id.* art. II, § 2, cl. 2. It is not clear, however, whether even these limits can be regulated by the judiciary. *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 205-24 (1972). In any event, they are outside the scope of this article.

12. *Id.* at 771.

13. *Id.* at 784-85. The Court could have cited Chief Justice Marshall as authority for the affirmative proposition that at least in times of war, the Constitution does not protect overseas aliens:

> Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will.

Brown v. United States, 12 U.S. (8 Cranch) 110, 122-23 (1814).

Faced with such impressive authority to the contrary, the *Eisentrager* Court declined to impose such an innovation.[14]

Seven years later in *Reid v. Covert*,[15] the Court again confronted the question of the extraterritorial effect of the Constitution. In the face of a series of rather bald statements in earlier decisions suggesting that the Constitution did not apply outside the boundaries of the several states,[16] a divided Court held that some limits do exist when the United States acts overseas. Significantly, the plurality opinion of Mr. Justice Black and the separate concurrences of Mr. Justice Frankfurter and Mr. Justice Harlan each made clear that only the relation between the United States and its citizens was involved.[17] Nothing in those decisions

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14. Two grounds exist for limiting *Eisentrager* to its facts, thereby undercutting its support for the broader proposition advanced in the text. First, *Eisentrager* involved enemy aliens who had borne arms against the United States. Although the Court regarded this fact as important, its opinion did not stress the distinction and much of the argument advanced therein applies with equal force to foreign nationals other than enemy aliens.

Second, one can interpret the decision as recognizing a limitation on the statutory jurisdiction of federal courts to grant habeas corpus, not on the existence of constitutional rights. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1399-1402 (1953). Although one can find support for this reading of *Eisentrager* in portions of the opinion, other language indicates the Court believed judicial power was absent because there were no rights to enforce. Contemporary decisions of the Court suggest an unwillingness to deny habeas corpus jurisdiction where valid constitutional claims did exist. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); Burns v. Wilson, 346 U.S. 137 (1953).

15. 354 U.S. 1 (1957).

16. *E.g.*, Balzac v. Porto Rico, 258 U.S. 298, 304-05 (1921); Dorr v. United States, 195 U.S. 138, 149 (1904); Hawaii v. Mankichi, 190 U.S. 197, 218 (1903).

17. *See, e.g.*, 354 U.S. at 5, 6, 7 (opinion of Black, J.); *id.* at 64 (Frankfurter, J., concurring); *id.* at 67 (Harlan, J., concurring). Lower courts until recently have respected the distinction. *See, e.g.*, Best v. United States, 184 F.2d 131 (1st Cir. 1950); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976); Williams v. Blount, 314 F.

can be taken as altering the long held understanding that, in general, foreign nationals abroad are neither parties to nor beneficiaries of the agreement between the federal government and its people embodied in the Constitution.[18]

Since 1971, the Court has rendered a series of decisions considering equal protection challenges to distinctions made on the basis of alienage.[19] Although a few lower courts appear to have concluded that these cases mean that overseas aliens enjoy the same constitutional rights as citizens abroad,[20] substantial reasons exist to believe *Eisentrager* remains good law. A careful analysis of the Court's equal protection opinions suggests that the evil the Court has meant to address is discrimination against aliens at the state, but not the federal, level.[21] Unreasonable state restrictions on the rights of aliens within this country interfere with the power of the federal government to set the terms on which aliens can stay in this country.[22] No decision of the Court, however, has held that equal protection constraints require the federal government in exercising this and other powers domestically to treat alien and citizen alike, or even similarly.[23] It seems reasonable to

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Supp. 1356 (D.D.C. 1970). *See also* United States v. Williams, 617 F.2d 1063, 1091-93 (5th Cir. 1980) (Roney, J., concurring).

18. *See* note 25 *infra* & accompanying text.

19. Ambach v. Norwick, 441 U.S. 68 (1979); Foley v. Connelie, 435 U.S. 291 (1978); Nyquist v. Mauclet, 432 U.S. 1 (1977); Examining Bd. of Engineers v. Flores de Otero, 436 U.S. 572 (1976); *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

20. *See, e.g.*, United States v. Cadena, 585 F.2d 1252, 1262 (5th Cir. 1978); United States v. Winter, 509 F.2d 975, 989, n.45 (5th Cir. 1975); United States v. Tiede, 86 F.R.D. 227, 259 (Berlin 1979). *See also* Narenji v. Civiletti, 481 F. Supp. 1132 (D.D.C. 1979), *rev'd*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 2928 (1980).

21. *See* Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?* 31 STAN. L. REV. 1069 (1979).

22. *See* Graham v. Richardson, 403 U.S. 365, 377-80 (1971); *id.* at 383 (Harlan, J., concurring in part).

23. *See* Fiallo v. Bell, 430 U.S. 787 (1977); Mathews v. Diaz, 426 U.S.

infer, therefore, that the Constitution also does not require similar treatment of citizens and aliens when the United States acts abroad.

Of course, the fact that Supreme Court precedent seems to point against the existence of constitutional rights in overseas aliens does not end the matter. The Court remains free to reconsider the question in light of experience and the general development of civil liberties, especially as none of its decisions squarely confronts the issue. Some lower courts have argued that because aliens present within the United States may claim constitutional protection, no reason exists for different treatment abroad. For example, the Second Circuit has declared that "[n]o sound basis is offered in support of a different rule with respect to aliens who are the victims of unconstitutional action abroad, at least where the government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States." [24]

Apart from the court's question-begging assertion concerning "unconstitutional" and "unlawful" overseas actions, one has difficulty interpreting these remarks. The court could be making any of the following arguments. First, protection of the interests of citizens might require, as a prophylactic measure, that the government be punished whenever it violates particular norms, in order to ensure that the next victim will not be a citizen. Second, regardless of the effect on citizens, certain behavior might be impermissible whenever the government engages in it, no

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67 (1976). In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), handed down with *Diaz*, the Court invalidated a federal restriction on aliens, but not on equal protection grounds. In fact, the Court expressly noted several reasons which, if properly presented, could have justified the particular distinctions between citizens and aliens. *Id.* at 103-04.

24. United States v. Toscanino, 500 F.2d 267, 280 (2d Cir. 1974). *See* United States v. Cortes, 588 F.2d 106, 110 (5th Cir. 1979); United States v. Cadena, 585 F.2d 1252, 1262 (5th Cir. 1978).

matter who is the victim. Finally, whether or not the government can be deterred from misbehaving abroad, courts should not lend their offices to such misconduct by accepting its fruits.

The first contention — that extraterritorial application of the Constitution would redound to the benefit of U.S. citizens — runs counter to both established doctrine and substantial practical concerns. To put the question in perspective, one should start with the traditional view of the Constitution as a compact between the people of the United States and its government, creating enforceable rights and duties running between each of the parties.[25] Although one might envision this compact as obligating the government to assume a duty with respect to some class of third parties, thereby creating rights in the latter, one should not push the idea too far. The benefits to the people of the United States derived from the government's assumption of such a duty should be substantial and unmitigated before that duty is imposed.

An assessment of a judicially imposed extension of constitutional rights to overseas aliens suggests that the benefits to the people of the United States might not be great while the costs could be considerable. As already noted, the benefit to be obtained is the deterrence of government behavior that would be unacceptable if directed towards citizens. With respect to aliens in our midst, this benefit is considered sufficiently substantial to justify imposing constraints on government action.[26] When the government behavior takes place abroad, however, the

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25. *See* THE FEDERALIST NOS. 39, 43 & 44 (J. Madison); *see also id.* No. 22 (A. Hamilton).

26. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Court declared: "These provisions [of the fourteenth amendment] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality . . . ." *Id.* at 369.

likelihood of an indirect effect on actions against citizens is reduced. Physical separation from our country, lesser notoriety, and the fact that government personnel generally are compartmentalized along foreign domestic lines all tend to prevent "infection" of domestic government behavior by foreign misconduct. As for citizens who live abroad, far greater threats to their civil liberties often are faced in their country of residence than those posed by our government.

Perhaps most important, the cost of judicially imposed constraints on the foreign behavior of our government is unacceptably high. Often the government acts overseas to protect the interests of the United States, as when it apprehends a terrorist or drug smuggler or retaliates against a foreign power for its acts which are hostile to U.S. interests. Judicial barriers would impede and perhaps inhibit these efforts. Especially where the government acts in a country that is hostile to its endeavors, irregular conduct may be the only way of protecting U.S. interests. The judiciary should not take it upon itself to rule out such action in all cases. Needless to say, no obstacle corresponding to a hostile host country exists when the government acts domestically.

A concern about reciprocity highlights another cost of judicial extension of constitutional rights to overseas aliens. Much can be said for encouraging civilized behavior by all nations. Adherence to certain norms of conduct by the United States could establish an example others would emulate. Unilateral imposition of restraints on official activity, however, would preclude the President and Congress from negotiating with other countries to improve their behavior. If court-imposed rules required the U.S. government to treat foreign nationals a certain way regardless of their own government's actions, a substantial bargaining chip for encouraging better conduct would be sacrificed. It is the political branches, and not the courts, which should decide what conduct is appropriate.

Many of these points also rebut the second and third arguments in favor of the extension of constitutional safeguards to overseas aliens. As Hohfeld suggested, rights and duties are best analyzed not as moral absolutes owed to or demanded from the entire world, but rather as different aspects of bilateral relationships between particular parties.[27] A great deal of history lies behind the idea that the Constitution, above all, embodies a series of reciprocal obligations between the people of this country and their government. Extending rights to aliens, to individuals who are not parties to the compact between the federal government and its people, is contrary to this tradition and should be rejected unless it can be said that, by doing so, substantial benefits will inure to U.S. citizens.

For the reasons advanced above, no good reason exists to depart from the traditional conception of the Constitution in this instance. Unlike domestic aliens, whose presence in our midst implicates a variety of concerns to citizens, overseas aliens are not in a position to trigger significant constitutional concerns. However desirable it may be for the United States to encourage humane and generous behavior in the conduct of affairs among nations, in the absence of world hegemony it cannot impose these standards unilaterally. The existence of hostile nations possessing considerable power precludes such a step. Selective imposition of individual rights standards thus involves a grasp of foreign relations that the judicial department simply does not possess.

A few practical examples may illustrate the point. The Supreme Court has recognized that constitutional rights, where they exist, can be asserted in a variety of ways. Where the government is engaged in a continuing course of unconstitutional conduct, courts may enjoin the wrongful action; where the constitutional violation is past, courts

27. *See* Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30-44 (1913).

may award damages.[28] If the Constitution had extraterritorial effect with respect to aliens, presumably aliens could enlist the aid of our courts in attacking government misconduct. Mr. Justice Jackson envisioned just such a possibility in *Eisentrager*:

> Such a construction [of the Constitution] would mean that during military occupation irreconcilable enemy elements, guerilla fighters, and "werewolves" could require the American Judiciary to assure them freedom of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against "unreasonable" searches and seizures as in the Fourth, as well as rights to jury trials as in the Fifth and Sixth Amendments.[29]

Those citizens of North Vietnam who suffered risk of a "taking" of "life" without "due process" during the bombing of that country could have sought an injunction against the raids based on the fifth amendment, and survivors of those killed now could seek damages against our government. Those Iranians who were temporarily detained in the desert during the unsuccessful attempt to rescue the U.S. hostages could sue for violations of their fourth amendment rights. Foreign leaders everywhere could seek to enjoin the surveillance of their actions by U.S. intelligence services.

These examples, perhaps extreme, do not address the third point raised in favor of extending constitutional protection to overseas aliens — that courts may be unable to stop, but should not participate in, unacceptable behavior by the government abroad. Affording positive relief to overseas aliens who have been victimized by government misconduct may result in too much judicial interference

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28. Carlson v. Green, 100 S. Ct. 1468 (1980); Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Bolling v. Sharpe, 347 U.S. 497 (1954).

29. 339 U.S. at 784.

with foreign relations, but a refusal to accept jurisdiction over persons wrongfully captured, or to admit evidence seized in a particularly outrageous manner, simply withdraws judicial assistance from the implementation of a particular governmental decision. Such a position insulates the U.S. system of justice from unacceptable government behavior without barring the pursuit of foreign policy objectives by nonjudicial means.[30] One might even reconcile this stance with traditional distinctions between constitutional protection of domestic and overseas aliens by asserting that a violation of due process takes place not when the government initially acts unacceptably against an alien outside the United States, but rather later when the wrongfully seized alien or evidence is presented for trial within the United States.[31]

Even this limited degree of constitutional protection for overseas aliens suffers from several drawbacks. Although courts have an important obligation to protect the integrity of the judicial process, it requires more than a little stretching to invent individual liberties solely to serve this

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30. This position, if limited to the federal judiciary, could rest on the supervisory power possessed by federal appellate courts to control the conduct of inferior courts. *See* Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). *Toscanino* referred to this authority as an alternate, nonconstitutional basis for its holding, 500 F.2d 267, 276 (2d Cir. 1974), and at least one member of the Second Circuit since has advocated extending *Toscanino* under the aegis of supervisory power. United States v. Lira, 515 F.2d 68, 73 (2d Cir.) (Oakes, J., concurring), *cert. denied*, 423 U.S. 847 (1975). Besides its inapplicability to state criminal prosecutions, such a rule could be reversed by express congressional enactment. Moreover, the Supreme Court has expressed hostility to efforts to use federal appellate courts' supervisory powers to circumvent constitutional issues implicated by the exclusionary rule. *See* United States v. Payner, 100 S. Ct. 2439 (1980).

31. This limited definition of a due process violation seems to underlie the court's observation in Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 152 (D.D.C. 1976), that the government's wrongful acts in *Toscanino* took place within the United States, *i.e.*, when the improperly apprehended defendant was presented for trial.

institutional interest. A judicial refusal to accept persons or evidence obtained through particular government conduct, coupled with an unwillingness to arrest the objectionable conduct, seems, if not paradoxical, at least hypocritical. Acts that would impair judicial integrity if their fruits were brought into the courtroom also undermine the integrity of the branch of government that performs them. If the admission of particular evidence or persons obtained through an especially unattractive overseas seizure would " 'debase the processes of justice'," [32] the continuation of the seizure through prolonged, perhaps cruel detention also would debase the government itself.

The current jurisprudence of the Supreme Court seems to favor positive judicial action to undo unconstitutional government conduct.[33] On balance, this tolerance of the offensive use of constitutional safeguards by U.S. citizens seems sound. If a particular individual interest is of sufficient significance to command judicial protection at all, its vindication probably should not depend on the government's decision to involve that individual in a criminal prosecution. The converse should follow. Where particular governmental conduct is not sufficiently objectionable to warrant the exercise of the judiciary's established remedial powers, its fruits should not be regarded as so reprehensible as to taint the judiciary by association.

A constitutional right not to have unacceptably seized persons or things submitted to a U.S. court suffers from yet another major flaw. Although the right stems from action in this country — submission to the court — its real predicate is the initial overseas seizure. The right does not exist unless the court determines the government acted unacceptably overseas. Yet, the competence of courts to assess the acceptable and the unacceptable in overseas gov-

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32. United States v. Toscanino, 500 F.2d 267, 276 (2d Cir. 1974).

33. *See* cases cited at note 28 *supra*.

ernment behavior seems particularly inferior to that of the political branches of government. Where the rights of citizens abroad are involved, courts at least possess a frame of reference in the form of rights enjoyed by a citizen domestically. The rights enjoyed by an overseas alien against his government, by contrast, vary dramatically throughout the world. Furthermore, relations between the United States and those governments can range almost as widely. Without understanding these referents, an assessment of the propriety of official conduct is impossible. Yet it is exactly these factors that the Executive and Congress, not the courts, can best appreciate.[34]

One might answer all of these arguments by contending that the recognition of constitutional rights in aliens abroad would not mean the establishment of absolute bars to government action, including furtherance of particular criminal prosecutions, but rather a judicial balancing of the individual and governmental interests. In times of armed conflict or diplomatic hostility, the government's need to act irregularly might, using the jargon of constitutional law, become "compelling," and no "less restrictive means" might be available. But this argument refutes itself. One hardly can imagine a less appealing spectacle than that of judges weighing and balancing the worth of particular foreign policy objectives in a given case. In spite of the wide range of governmental functions now conducted under judicial auspices, the day-to-day decision-making of foreign

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34. Professor Paust seems to believe that international human rights agreements provide sufficient guidance for federal courts to determine the acceptability of particular government conduct. *See* the article by Paust, at pp. 204-27 of this text. Where such agreements apply, courts, of course, must enforce them according to their terms. Yet it is important not to disregard the nature of these treaties as voluntarily assumed agreements containing reciprocal obligations. It is inappropriate for courts to create unilateral obligations to which the United States has not consented under the guise of imposing constitutional limits. *See* notes 52-55 *infra* & accompanying text.

relations has been and should remain an area into which courts do not delve.[35] Flexibility, discretion, and expertise — virtues that run counter to the values of judge-made law — count for too much in this environment. Whatever one's views about judicial competence as a general matter,[36] surely the inability of judges to make foreign policy should be manifest.[37]

Several other arguments in support of extending the extra-territoriality of the Constitution can be dealt with summarily. One might contend that the absence of overseas

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35. *Compare, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) (school administration); White v. Regester, 412 U.S. 755 (1973) (structure of local government); Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977) (fire department hiring), *vacated as moot*, 440 U.S. 625 (1979); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (mental hospitals), *with* Goldwater v. Carter, 444 U.S. 996 (1979) (termination of treaty); Ludecke v. Watkins, 335 U.S. 160 (1948) (detention of enemy aliens); *Ex parte* Peru, 318 U.S. 578 (1943) (immunity of foreign government).

Judicial reluctance to interfere with the foreign relations decisions of the executive and Congress should be distinguished from the obligation of federal courts to decide questions of international law in the absence of direction from the other branches of government. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); The Paquete *Habana*, 175 U.S. 677, 700 (1900). This latter form of lawmaking, variously characterized as "interstitial" or "preemptive", does not undercut the authority of the political branches to make foreign policy. *See generally* Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967); Moore, *Federalism and Foreign Relations*, [1965] DUKE L.J. 248.

36. For an excellent appraisal of these issues, see Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978).

37. Recognition of these limits on judicial powers appears to have come, albeit belatedly, even to Congress. The intelligence oversight bill originally proposed by majority members of the Senate Select Intelligence Committee contained provisions mandating substantial judicial supervision of foreign intelligence activities involving U.S. citizens. *See* S. 2284, 96th Cong., 2d Sess. §§ 221-223, 231-232, 126 CONG. REC. S1307, S1313-14 (daily ed. Feb. 8, 1980). The bill voted out of committee and passed by the Senate contained none of these provisions. *See* 126 CONG. REC. S6171 (daily ed. June 3, 1980).

aliens' constitutional rights cannot be reconciled with those protections that are conceded to exist for overseas citizens. Affording overseas citizens certain constitutional rights equally may impede important government interests. One can respond to this point in two ways. First, it is not clear that the Constitution sets any substantial limits on actions even against citizens when the U.S. government acts in a hostile host country. *Reid* involved a military base over which the United States had extraterritorial authority. Even though located outside the boundaries of this country, the exercise of government authority at issue — the conduct of a court martial — was in some sense a manifestation of the "sovereign power" of this nation.[38] Where the actions of our government are in derogation to the superior authority of a host country, the force of *Reid* is diminished substantially.[39] Second, the constraints government must observe

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38. *See* Balzac v. Porto Rico, 258 U.S. 298, 312 (1922). The most obvious instances where the "sovereign power" of the United States exists outside the boundaries of the various states are the territories and possessions of the United States. In some of these territories, the relationship between the resident, the territory, and the federal government may approach that between a citizen, a state, and the United States. The most clearly settled example is Puerto Rico. Torres v. Puerto Rico, 442 U.S. 465, 471 (1979); Examining Bd. of Engineers v. Flores de Otero, 426 U.S. 572, 599-601 (1976).

This article does not attempt to define the exact characteristics of the "sovereign" power of the United States or to describe precisely where it is exercised. It is enough to note that in much of the world the United States is not sovereign under any definition of the term.

39. *See* Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 152 (D.D.C. 1976).

Recent developments in British constitutional law may be instructive. In British courts, the government's assertion of "act of state," where applicable, serves as a complete bar to judicial review. The doctrine long has been held to forbid a civil recovery in British courts for injuries perpetrated overseas under Crown authority against aliens. Buron v. Denman, 154 Eng. Rep. 450 (Ex. 1848). At the same time it was thought that the Crown never could plead act of state against its own subjects. *See* Williams, *The Correlation of Allegiance and Protection*, 10 CAMBRIDGE L.J. 54 (1948). Statements in a recent case, however, suggest that the

when acting against its citizens are in any event part of the original bargain reflected in the Constitution, and are reciprocated by obligations imposed on the citizen that the alien need not honor.

Finally, it is necessary to restate what should be implicit throughout this discussion. The absence of constitutional limitations on government actions affecting overseas aliens in no way undermines those rights that are conceded to exist in aliens who come voluntarily or are brought into this country. Once an alien arrives in the United States, he must be tendered those rights due, including, one presumes, a speedy arraignment before a magistrate to establish probable cause to detain.[40] Any criminal proceedings would be governed by the traditional constitutional safeguards, including those rules that exclude unreliable or misleading evidence.[41] It is only those governmental acts that occurred before the alien's entry into this country, and most particularly his capture, that need not be governed by the standards applicable when the government acts against overseas citizens.[42]

In sum, both Supreme Court precedent and matters of principle and practicality favor the recognition of a dis-

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plea may be good against the suit of a subject when the injury caused by the government occurs outside the dominions of the Crown. *See* Attorney-General v. Nissan, [1969] 1 All E.R. 629, 642, 645, 650, 658, 662 (H.L.). For scholarly commentary advocating this result, see Collier, *Act of State as a Defence Against a British Subject*, 26 CAMBRIDGE L.J. 102 (1968). The availability of this defense is the functional equivalent of the unavailability of constitutional protection under U.S. law, as the net effect in both cases is to grant the executive and legislature the prerogative of honoring the claim without judicial interference. *See id.* at 120.

40. *See* Gerstein v. Pugh, 420 U.S. 103 (1975).

41. Thus a confession extracted by means of torture would be excluded not because of the individual's right not to be tortured, but because of the inherent unreliability of such confesssions. *See* Brown v. Mississippi, 297 U.S. 278 (1936).

42. *See* notes 29-33 *supra* & accompanying text.

tinction between citizens and aliens when courts seek to impose limits on the overseas actions of the United States. Both domestic political pressures and good diplomacy very well may require the United States to observe certain norms in its treatment of foreign nationals, but the courts should not oppose the government when circumstances compel otherwise. At end, the protections to be accorded overseas aliens, if any, should be left wholly to the political branches of the government.

II. What Conduct Against Overseas Citizens Does the Constitution Forbid?

Assuming that the Constitution limits the government's overseas efforts to acquire custody of someone only when the person seized possesses citizenship or similar affiliation with the United States, it is necessary to consider the nature of the limits imposed. Brutal acts by representatives of the United States against persons who generally enjoy constitutional protection doubtlessly violate some provision of the Constitution, whether it be the fourth amendment's prohibition of unlawful searches and seizures or the fifth amendment's guarantee of due process in the taking of life or liberty. Two issues trouble the courts: First, whether conduct not arising independently to the level of a constitutional violation nonetheless may be considered unconstitutional if contrary to a treaty obligation or norm of international law; and second, the degree to which U.S. officials must participate directly in the allegedly unlawful conduct under attack.

A. Violations of International Law

In the last two decades, the Supreme Court has developed a variety of constitutional limitations on the arrest of crim-

inal suspects.[43] Although it is doubtful that all of these rules apply to overseas arrests of citizens,[44] it can be assumed that many of these limitations are applicable. Furthermore, the constitutional prohibition of government conduct that "shocks the consience" serves as a backstop in limiting the manner in which overseas captures are accomplished,[45] although again one suspects that the conscience might be less excitable when particular conduct against citizens occurs abroad. The problem that has bedeviled the lower courts concerns misconduct that meets neither of these standards but that nonetheless appears to depart from other requirements of positive law.

In *United States v. Toscanino*,[46] perhaps the leading case in this area, the U.S. Court of Appeals for the Second Circuit suggested that methods of capture that allegedly violated various treaties and international agreements automatically exceeded constitutional limits.[47] The apparent logic of this result, such as it is, rests on the premise that any action of government contrary to law, no matter what the source of the law violated, constitutes a denial of due process. Within a year, however, another panel of the same court held that violations of international law did not,

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43. *See, e.g.*, Payton v. New York, 445 U.S. 573 (1980); Ybarra v. Illinois, 444 U.S. 85 (1979); Michigan v. De Fillippo, 443 U.S. 31 (1979); United States v. Watson, 423 U.S. 411 (1976); Adams v. Williams, 407 U.S. 143 (1972); Chimel v. California, 395 U.S. 752 (1969); Terry v. Ohio, 392 U.S. 1 (1968); Mapp v. Ohio, 367 U.S. 643 (1961).

44. One doubts, for example, that warrant requirements, *e.g.*, Payton v. New York, 445 U.S. 573 (1980), could apply overseas, where federal magistrates are few and far between.

45. *See* Rochin v. California, 342 U.S. 165, 172 (1952).

46. 500 F.2d 267 (2d Cir. 1974), *noted in* 41 Brooklyn L. Rev. 1109 (1975); 8 Conn. L. Rev. 141 (1975); 50 N.Y.U. L. Rev. 681 (1975); 12 San Diego L. Rev. 865 (1975); 54 Tex. L. Rev. 1439 (1976); 15 Va. J. Int'l L. 1016 (1975).

47. 500 F.2d at 276-78. *But see id.* at 281-82 (Anderson, J., concurring).

by themselves, amount to unconstitutional behavior.[48] "[W]e did not intend to suggest that *any* irregularity in the circumstances of a defendant's arrival . . . would vitiate the proceedings . . . .", the court explained.[49] Specifically, the fact that the government allegedly had violated the United Nations Charter and the Charter of the Organization of American States was held not to present a constitutional issue, even though those treaties provide no means for an individual to obtain judicial redress.[50]

In retrospect, it seems fortunate that *Toscanino's* flirtation with incorporating international law into the Constitution was shortlived. Two reasons support rejection of this innovation. First, treaties and other international agreements typically provide their own mechanisms by which States, as parties to the agreements, may seek to redress violations. Regarding treaty breaches as unconstitutional acts simply substitutes the remedial mechanisms developed to enforce the Constitution. Second, amendment of such treaties through constitutional incorporation may alter significantly the balance struck therein.

The Constitution clearly allocates the power to bind the United States to international obligations to the executive and legislative branches of the government.[51] While the courts play a significant role in interpreting these agreements, they do not have the power to create obligations that the political departments have not accepted. It is one thing for judges, in interpreting international agreements, to discover innovative means for their enforcement.[52] It is quite another for judges to ignore

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48. United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

49. *Id.* at 65 (emphasis in original).

50. *Id.* at 66-67.

51. U.S. CONST. art. II, § 2, cl. 2.

52. *See, e.g.*, Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (private right of action implied in Warsaw Convention).

express limitations on enforcement under the guise of remedying constitutional violations. By slighting such limitations — as, for example, provisions vesting exclusive power to protest violations in the signatory government [53] — courts alter the content of the agreement embodied in these treaties. Such fabrication of obligations is all the more dangerous because U.S. courts cannot bind other signatories to their interpretation. The net effect would be the incorporation of a term in such treaties to which the United States did not consent, and by which other parties are not bound.

Efforts to incorporate international law or, for that matter, statutes, administrative rules or other kinds of positive law into the Constitution suffer from obvious defects. Not surprisingly, the Supreme Court consistently has resisted efforts to transform statutes and administrative rules into constitutional requirements by judicial fiat. Most recently, in *United States v. Caceres*,[54] the Court held that a search conducted in violation of an I.R.S. regulation did not thereby transgress the fourth amendment. The regulation itself did not authorize exclusion as a consequence of violation, and the Court refused to invent such a remedy itself. As the Court observed: "[S]ince the content, and indeed the existence, of the regulations would remain within the Executive's sole authority, the result [of

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53. For example, both the structure and the terms of the U.N. Charter and the Charter of the Organization of American States demonstrate that the provisions of the respective compacts govern the relationship between sovereign States. *See, e.g.*, U.N. CHARTER arts. 33-38, O.A.S. CHARTER arts. 20-22. By contrast, the Warsaw Convention which, *inter alia*, establishes rules of liability for air crashes occurring in the course of international flights, obviously is concerned with the ability of individuals to recover for losses sustained on account of accidents governed by the Convention. It is thus plausible that the *Benjamins* court could imply a private right of action. *See* 572 F.2d at 916-19. Implication of a private right of action under the U.N. Charter or the O.A.S. Charter, however, would alter the structure of the agreement dramatically.

54. 440 U.S. 741 (1979).

imposing the exclusionary rule] might well be fewer and less protective regulations." [55] Similarly, in the case of international agreements, judicial creation of remedies rejected by the agreement itself may well result in fewer and less protective treaties.

B. Governmental Complicity

An issue left open in *Toscanino* was the amount of U.S. involvement in the alleged wrongdoing that would be necessary to trigger constitutional safeguards. Subsequently, the Second Circuit held that direct U.S. involvement in the challenged acts, and not simply a U.S. request for custody which provided an opportunity for misconduct by a foreign government, was necessary to make out a constitutional violation.[56] This position seems plainly right. The Constitution, after all, binds only the U.S. government, the states, and their citizens. It does not of its own force create obligations on the part of foreign nations or citizens. At the same time, the government should not be able to circumvent constitutional limitations by employing foreign agents to do indirectly what it could not do directly.

The Supreme Court has grappled with this agency problem in a related context. In *Burdeau v. McDowell*,[57] the Court observed that the fourth amendment, which limits searches and seizures, "was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies . . . ." [58] As a result, the government could use evidence that it knew to have been stolen by a private party. Where the federal government has participated jointly with an agency not bound by the fourth amendment in seizing particular

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55. *Id.* at 756.

56. United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

57. 256 U.S. 465 (1921).

58. *Id.* at 475.

items, however, the Court has forbidden use of the evidence in a federal prosecution.[59]

Not all of the Supreme Court's decisions defining federal complicity in the wrongful behavior of others may be applicable when challenged acts are perpetrated by foreign powers acting within their own jurisdiction. When it acts overseas, the United States is at most a subordinate sovereign subject to the paramount authority of the host country. Because of this lesser authority, greater federal involvement may be necessary before the United States becomes liable for the behavior of foreign officials. At the very least, the Court's pronouncements establish as a bedrock principle that the United States does not violate the Constitution when it accepts custody of a person knowing he has been abused by a foreign sovereign.[60]

III. Remedies

Once a breach of the constitutional rights of an overseas citizen in the course of his rendition has occurred, the question becomes one of remedies. The Constitution, even when it explicitly creates a right in favor of an individual, does not prescribe the consequences of that right's abridgement. Traditionally, courts have taken the leading role in developing the remedies that attend constitutional viola-

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59. During the period before the due process clause of the fourteenth amendment was held to apply fourth amendment standards to the states, evidence obtained by state police in violation of these standards was held admissible in federal trials. Feldman v. United States, 322 U.S. 487 (1944); Weeks v. United States, 232 U.S. 383 (1914). In a series of cases the Supreme Court determined the degree of complicity of federal officials in such violations necessary to bar the use of evidence obtained in a federal trial. *See* Gambino v. United States, 275 U.S. 310 (1927); Byars v. United States, 273 U.S. 28 (1927).

60. The position of Professor Paust is to the contrary. *See* Paust, note 34 *supra*. I do not understand him to argue seriously that Supreme Court authority supports his all-encompassing notion of complicity, and as a matter of logic and policy his interpretation seems insupportable.

tions.[61] In the case of criminal suspects who have been arrested unconstitutionally, courts have considered three possible remedies — termination of the prosecution, suppression of evidence seized pursuant to the unlawful arrest, and creation of civil liability on the part of the arresting officials.

Suppression of evidence seized unconstitutionally seems the most straightforward rule, and has been discussed more fully elsewhere.[62] The precise limits imposed by the Constitution may vary depending on whether the seizure of a citizen and his possessions takes place domestically or abroad, but the applicability of this particular remedy probably should not. Termination of the prosecution and civil liability present greater problems.

U.S. courts generally have followed the rule that defects in the process by which the government acquires custody of a suspect will not bar his subsequent prosecution. In *Ker v. Illinois,*[63] a suspect was kidnapped by a state agent in Peru and brought to the United States for trial in a state court. The Supreme Court held that the state could proceed in spite of the method by which it captured the defendant. Sixty-six years later, the Court reaffirmed *Ker* in *Frisbie v. Collins,*[64] a case almost identical to the earlier decision except that the kidnapping had taken place within the United States. The timing of *Frisbie* is significant, as the Court handed down its ruling only shortly after deciding for the first time that the Constitution, under certain circum-

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61. On the jurisprudence of constitutional remedies, see generally Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969); Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1 (1968).

62. *See* Saltzburg, *The Reach of the Bill of Rights Beyond the* Terra Firma *of the United States*, 20 VA. J. INT'L L. 741 (1980); Note, *The Fourth Amendment Abroad: Civilian and Military Perspectives*, 17 VA. J. INT'L L. 515 (1977).

63. 119 U.S. 436 (1886).

64. 342 U.S. 519 (1952).

stances, forbade the use in a state criminal proceeding of evidence seized in violation of fourth amendment standards.[65] As a result, *Frisbie* cannot be distinguished away, as *Ker* might be, on the ground that the manner of capture was not considered at that time to be unconstitutional. In spite of considerable academic criticism of the *Ker-Frisbie* doctrine,[66] the Court has continued to endorse it, most recently this year in *United States v. Crews*.[67]

Despite these clear rulings by the Supreme Court, one lower federal court has insisted on at least the theoretical possibility of dismissing a prosecution to punish an international kidnapping by the United States. On the basis of factual allegations not much different from those in *Ker*, aside from an additional claim of torture by U.S. agents, the Second Circuit held that the means of capture in the present case, if proved, were so reprehensible as to deprive any court of jurisdiction to try the defendant.[68] The court characterized *Ker* and *Frisbie* as "restrictive" and "unenlightened," and expressed its belief that the Supreme Court would abandon or modify the rule contained therein when given an opportunity.[69] Reported cases do not reveal a single instance, however, in which the dismissal sanction actually has been imposed.[70]

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65. *See* Rochin v. California, 342 U.S. 165 (1952).

66. *See* Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16 (1953); Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231 (1934); Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579 (1968); Scott, *Criminal Jurisdiction of a State over a Defendant Based Upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91 (1953).

67. 445 U.S. 463, 477 (1980) (Powell, J., concurring in part); *id.* at 1253-54 (White, J., concurring in the result). *See* Stone v. Powell, 428 U.S. 465, 485 (1976); Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

68. United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

69. *Id.* at 275.

70. On remand in *Toscanino*, the district court found the defendant's allegations to be unsubstantiated in material part. United States v. Toscanino, 398 F. Supp. 916 (E.D.N.Y. 1975). Second Circuit cases after

Given the fact that the Supreme Court has reaffirmed its support for the *Ker-Frisbie* doctrine three times since the Second Circuit's decision,[71] predictions of the doctrine's demise seem ill-founded. One suspects that any attempt by a lower federal court to overturn a criminal conviction solely on the basis of an improper arrest would result in a prompt reversal. One still may ask, however, whether circumstances exist under which the Constitution should be interpreted to require dismissal of the charges.

The difficulty with the dismissal sanction is its functional equivalence to a pardon for the crime sought to be prosecuted. In cases involving serious crimes, this societal cost could be entirely out of proportion to the government misconduct the sanction is designed to punish, especially as the grounds for dismissal would be unrelated to the culpability of the accused. Of course the exclusionary rule, the time-honored, if controversial sanction for unconstitutional searches and seizures, often has the effect of barring a new prosecution,[72] but the government, at least in theory, has

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Toscanino uniformly have distinguished that decision. *See* United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975); United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975). The Fifth Circuit has rejected *Toscanino* outright, *see* United States v. Herrera, 504 F.2d 859 (5th Cir. 1974), and the First, Third, Seventh, Eighth, and Ninth Circuits have declined to endorse that decision while reserving judgment on its application in a truly outrageous case. *See* United States v. Sorren, 605 F.2d 1211 (1st Cir. 1979); United States v. Peltier, 585 F.2d 314 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979); United States v. Marzano, 537 F.2d 257 (7th Cir.), *cert. denied*, 429 U.S. 1038 (1976); United States v. Lovato, 520 F.2d 1270 (9th Cir.), *cert. denied*, 423 U.S. 985 (1975); Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975).

71. *See* note 67 *supra*.

72. The passage of time is a critical factor in preventing reprosecution. Frequently, material witnesses die, disappear or are unable to recall events with sufficient clarity to present convincing testimony. Moreover, lawfully obtained evidence may be lost or destroyed. Finally, even where it may be possible to prove the defendant's guilt, limited prosecutorial resources can result in the decision not to press charges.

the power to proceed without the wrongfully obtained evidence. Furthermore, in collateral attacks on criminal convictions, the recent trend has been toward refusal to apply the exclusionary rule.[73] Although the decisions are not grounded expressly upon the desire to prevent otherwise guilty defendants from escaping prosecution, the special difficulty of reprosecuting those freed via habeas probably is a significant factor in the Court's analysis.[74]

Another defect of the dismissal sanction when used to remedy improper arrests is that it terminates proceedings which are not infected by the alleged wrong. From time to time government overreaching in the conduct of a trial is so great as to render continuation of the trial fundamentally unfair.[75] Improper capture, by contrast, does not affect the trial in any way, other than the fact that seizure of the defendant's person is a prerequisite to the trial's existence. If indictment is proper, pretrial proceedings go forward satisfactorily, and all improper evidence is excluded, the truth-finding process will be unimpaired no matter how violent the defendant's capture may have been. Dismissal of the prosecution under these circumstances can be justified

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73. For judicial discussion of the need to limit collateral relief, see Stone v. Powell, 428 U.S. 465 (1976); Mackey v. United States, 401 U.S. 667, 682-702 (1971) (Harlan, J., dissenting); Kaufman v. United States, 394 U.S. 217, 239-42 (1969) (Black, J., dissenting). The one exception to this trend in the Supreme Court is Rose v. Mitchell, 439 U.S. 816 (1979), where five Justices, only three of whom joined the judgment, asserted that claims of racial discrimination in grand jury selection were cognizable on federal habeas. These statements seem to reflect more the strong federal policy against racial discrimination than any fundamental rethinking of the need to limit collateral review of some constitutional criminal procedure claims.

74. *See* note 72 *supra*.

75. *See, e.g.*, Burks v. United States, 437 U.S. 1 (1978) (double jeopardy); United States v. Lovasco, 431 U.S. 783, 789 (1977) (preindictment delay) (dictum); Blackledge v. Perry, 417 U.S. 21 (1974) (vindictive prosecution); Barker v. Wingo, 407 U.S. 514 (1972) (speedy trial). *Cf.* United States v. Morrison, 602 F.2d 529 (3d Cir. 1979) (right to counsel), *cert. granted*, 100 S. Ct. 3048 (1980).

only on grounds that are wholly extraneous to the trial process itself. It is doubtful that these extraneous reasons sufficiently outweigh the societal costs.

The availability of alternative remedies also undercuts the case for the dismissal sanction. Those courts that have played with the idea of modifying the *Ker-Frisbie* doctrine have overlooked both the impact of the suppression of evidence and the possibility of imposing civil liability as a means of deterring government misconduct.[76] The Supreme Court first recognized a damages action as a proper remedy for unconstitutional arrests by federal agents in *Bivens v. Six Unknown Named Agents,*[77] and more recently has expanded considerably the power of federal judges to impose it.[78] One federal court of appeals has noted the appropriateness of civil liability in an international kidnapping case.[79] The possibilities presented by civil liability thus deserve a closer look.

Unlike the dismissal sanction, civil liability strikes a reasonable balance between society's interests in punishing wrongdoers and both the public and private interests in penalizing government misconduct. It invites a more focused inquiry into the nature of the injury perpetrated by the government and is capable of achieving a more precise degree of compensation. The victim can be made whole without creating a windfall benefit in the form of a pardon for possibly heinous acts. Only the particular governmental

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76. *See generally* United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

77. 403 U.S. 388 (1971).

78. *See* Carlson v. Green, 446 U.S. 14 (1980); Davis v. Passman, 442 U.S. 228 (1979); Butz v. Economou, 438 U.S. 478 (1978).

79. Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979). Other courts of appeals have recognized damages as a proper remedy for unconstitutional rendition by state officials. *See* Brown v. Nutsch, 619 F.2d 758 (8th Cir. 1980); McBride v. Soos, 594 F.2d 610 (7th Cir. 1979); Wirth v. Surles, 562 F.2d 319 (4th Cir. 1977), *cert. denied*, 435 U.S. 933 (1978); Sanders v. Conine, 506 F.2d 530 (10th Cir. 1974). *See also* Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975).

miscreants, rather than society as a whole, are punished. Moreover, the effectiveness of this remedy can be enhanced by using common-law doctrines. One example is the injury per se concept common in defamation actions.[80] In this way, it is possible both to deter the official misconduct and to compensate adequately the aggrieved party.

Although it is regrettable that governmental officials occasionally may engage in outrageous behavior, it does not necessarily follow that courts should respond with extreme penalties. Such vengefulness and indignation is inconsistent with the judicial obligation to balance conflicting interests in hopes of reaching a fair compromise. At least until the combined effect of civil liability and the exclusionary rule have proven ineffective in deterring government misbehavior, courts should not experiment with the extreme sanction of terminating a prosecution.

IV. Conclusion

Irregular forms of international rendition bring to the fore constitutional issues that have lurked in the background of various cases without having received definitive resolution. Confronted with disturbing allegations of government misconduct, lower federal courts have tended to brush aside important first questions. Rather than asking who owes what duty to whom, these courts have sought to impose strong penalties for what is clearly unpalatable but not necessarily unconstitutional action. The resulting analytical confusion has produced precedents that not only run counter to current doctrine but

80. For an example of the injury per se concept in defamation, which was held unconstitutional on grounds unrelated to the point at issue here, see New York Times Co. v. Sullivan, 376 U.S. 254, 262-63 (1964). On the relevance of state law analogies generally in the development of federal constitutional damages law, see Carey v. Piphus, 435 U.S. 247, 257-59 (1978).

which, if followed as far as their logic suggests, would produce indisputably unacceptable results.

Until a court actually frees a criminal solely because of perceived constitutional defects in his rendition, resolution of these issues by the Supreme Court appears unlikely. In the meantime, however, unwarranted assertions by lower courts may deter the government from exercising its own best judgment about the propriety of particular methods of capture. Courts need to identify with greater precision those areas where constitutional safeguards properly should exist; elsewhere, the government should be free to rely on its judgment without threat of judicial interference.

French Judicial Perspectives on the Extradition of Transnational Terrorists and the Political Offense Exception

Thomas E. Carbonneau

I. Introduction

This article [1] focuses principally upon the contemporary decisions [2] of the *Cour d'appel* of Paris dealing with the

1. In writing this article, the author has relied upon some previously published studies which have been updated and revised for the purposes of the present article. These previous studies include: Note, *The Provisional Arrest and Subsequent Release of Abu Daoud by French Authorities*, 17 Va. J. Int'l L. 495 (1977); Carbonneau, *The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created*, 1 Asils Inter'l. L.J. 1 (1977); Carbonneau, *Extradition and Transnational Terrorism: A Comment on the Recent Extradition of Klaus Croissant from France to West Germany*, 12 Int'l Law. 813 (1978). The present article parallels a similar but more extensive study entitled *Terrorists Acts — Crimes or Political Infractions? An Appraisal of Recent French Extradition Cases* which will be published by the Hastings International and Comparative Law Review in a forthcoming issue. For a more detailed analysis of the cases and further documentation, the reader should consult these previous studies.

2. These decisions are the following: In re Holder & Kerhow, Cour d'appel, Paris, E. McDowell, Digest of United States Practice in International Law 1975, 168; Abu Daoud, Cour d'appel, Paris, 104 J. Dr. Int'l-Clunet 843 (1977) (Decocq, *Note, id.* at 844) and Le Monde, Jan. 13, 1977, at 2, col. 1; Klaus Croissant, Le Figaro, Nov. 17, 1977, at 17, col. 3 and Conseil d'Etat, Paris, 106 J. Dr. Int'l-Clunet 91 (1979) (Ruzié, *Note, id.* at 96); Francesco Piperno, Le Figaro, Oct. 18, 1979, at 14, col. 6, and Le Monde, Oct. 19, 1979, at 1, col. 1 (an official copy of the court's decision was supplied to the author by Professor Richard B. Lillich of the University of Virginia School of Law and Mr. Louis Fields, Esq., of the U.S. Department of State). Since French police authorities arrested other suspected Italian terrorists in late March 1980, more judicial decisions regarding the extradition of terrorists from France should be forthcoming.

extradition of transnational terrorists.[3] In recent years, French law enforcement authorities have apprehended a number of transnational terrorists; these arrests have been followed by requests from other States for the extradition of the terrorists from France. The proceedings brought before the *chambre des mises en accusation* of the *Cour d'appel* of Paris have required the court to assess the legal validity of the extradition requests, involving a determination of whether they satisfied the procedural requirements for extradition and, in some instances, whether the extradition charges or request had a political character — a factor which would exempt the accused from extradition.[4] In regard to the political offense question,[5] the court has not subscribed to an "objective" definition of the concept of a political crime which limits political offenses to acts which injure directly the rights of the State (for example, treason or espionage) and which was characteristic of the approach used by earlier French courts; rather, it appears that the *Cour d'appel* has relied upon a "predominance"-like test under which more subjective factors, such as the actor's

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3. For a definition of the term "transnational terrorism", see Lillich & Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 217 n.1 (1977).

4. For a detailed discussion of French extradition law, see Aymond, *Extradition*, 2 ENCYCLOPEDIE DALLOZ (Dr. Pen.) ch. 1 (1968). *See also* Note, *The Provisional Arrest and Subsequent Release of Abu Daoud by French Authorities*, *supra* note 1, at 495, 495-96, 503-04. The French Extradition Statute Is the Law of March 10, 1927, [1927] Journal Officiel de las Republique Francaise [J.O.] 2874; [1927] 1 GAZETTE DU PALAIS 1019. For an analysis of the provisions of this law, see Travers, *La Loi Francaise d'Extradition du 10 Mars 1927*, 54 J. DR. INT'L-CLUNET 595 (1927). For an English language discussion of the subject of extradition, see 1 J.B. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION (1891).

5. For a discussion of the role of the political offense exception in French extradition litigation, see Huglo, *L'Extradition en ce Qui Concerne Les Délits Politiques*, 2 GAZETTE DU PALAIS *Doctrine* at 589 (1973). See also Daville, *L'Extradition*, Le Monde Dimanche, Dec. 16-17, 1979, Sect. Aujourd'hui/Dossier, at VIII, col. 1.

motivation, the purpose of the act, and the circumstances in which it was committed, are taken into consideration to determine whether the extradition charges have a political character.[6] Despite the adoption of this more flexible method of assessment, the latest decisions of the *Cour d'appel* of Paris point to the emergence of a trend which appears to promote the efforts of the international community to bring legal sanctions to bear against transnational terrorists.[7] The following analysis describes briefly how various national courts have dealt with the concept of a political offense in the extradition context, attaching particular importance to the past and present French judicial methodology, and considers in greater detail the individual French cases dealing with the extradition of transnational terrorists.

II. The Political Offense Exception to Extradition

The principle of exempting political offenders from the process of extradition has a fairly extensive history;[8]

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6. For a detailed discussion and analysis of the various tests which have been devised by the courts to define the concept of a political crime, see I. Shearer, Extradition in International Law 169 (1971). *See also* Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 Va. L. Rev. 1226, 1240 (1962).

7. The practice of other national courts in regard to the application of the political offense exception has been described in some detail in the previous studies cited in note 1 *supra*, particularly in the piece regarding the extradition of Abu Daoud. A representative list of the cases includes the following: In re State of Wisconsin & Armstrong, 28 D.L.R. 3d 513 (1972), *aff'd* 32 D.L.R. 3d 265 (1973); Cheng v. Governor of Pentonville Prison, [1973] A.C. 931 (H.L.); In re Rolf Pohle, Wash. Post, Oct. 4, 1976, § A, at 24, col. 1 (Sup. Ct. Athens, Oct. 1, 1976).

8. For a detailed discussion of the emergence of the political offense exception and its relationship to the practice of granting asylum, see L. Koziebrodzki, Le Droit d'Asile (1962); 2 J.B. Moore, Digest of International Law 755 (1906); 1 L. Oppenheim, International Law 390 (1905); S. Sinha, Asylum and International Law (1971); Reale, *Le Droit d'Asile*, 63 Hague Recueil des Cours 471 (1938-I).

without engaging in a detailed historical study, it should be noted that the practice became a firmly established part of State practice, albeit with some resistance, during the nineteenth century.[9] Since that time, the courts of the world community have devised a variety of tests by which to deal with the problem of defining the concept of a political offense and applying it to extradition litigation.[10] First, there is the Anglo-American test under which political crimes must be incidental to and committed in the furtherance of a two-party struggle for power.[11] *Re Castioni*,[12] the leading English case, established the basic tenets of the test and the U.S. courts adopted and applied the English doctrine in *In re Ezeta* [13] and subsequent cases.[14] Second, the Swiss courts elaborated the requirements of the predominance test which contrasts with its Anglo-American counterpart in that a crime is deemed to be political in character if its political aspects outweigh, *i.e.*, predominate over, its common elements.[15] Of the three tests which have been devised, the predominance test is the most flexible and allows the courts the greatest discretion in reaching a determination; it gives them the prerogative of considering not only the circumstances in which the incident took place (*i.e.*, whether the act was an incident of a political disturbance), but also other factors, *e.g.*, the offender's personal motive as well as the relationship between his

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9. *See* 1 L. OPPENHEIM, *supra* note 8, at 392.

10. *See* text at and accompanying note 6 *supra*.

11. *See, e.g.*, In re Meunier, [1894] 2 Q.B. 415, 419. *See also* Bulletin de la Jurisprudence Anglaise, *Extradition*, 22 J. DR. INT'L-CLUNET 643 (1895).

12. [1891] 1 Q.B. 149. The court held that the acts of the accused must be "incidental to and form . . . part of political disturbances" and that they must be "in the furtherance" of those same disturbances. *Id.* at 165-66.

13. 62 F. 972, 997 (N.D. Cal. 1894).

14. *See, e.g.*, In re Gonzalez, 217 F. Supp. 717 (S.D.N.Y. 1963).

15. For a discussion of the Swiss predominance test, see Garcia-Mora, *supra* note 6, at 1252.

alleged purpose and the means he employed to achieve that purpose. *In re Ockert* [16] is one important illustration of the judicial application of the basic tenets of the Swiss predominance test.

Under both the Anglo-American and the Swiss tests, the courts have given the concept of a political offense an expansive interpretation in cases involving the extradition of individuals who have fled from totalitarian regimes. For example, in a celebrated English case involving the Polish Government's request for the extradition of seven Polish sailors [17] who had taken over their fishing vessel and sailed it to an English port and requested political asylum, the divisional court denied the extradition request.[18] The decision obtained despite the fact that the Polish extradition request was based upon extraditable offenses and that there was no political disturbance to justify the sailors' crimes; the court gave serious consideration to the sailors' allegation that a political officer had recorded their conversations while at sea in the aim of prosecuting them for their political opinions upon their return to Poland.[19] The court, in effect, attributed an expansive interpretation to the concept of a political offense by taking into account and emphasizing the special circumstances of the case, namely, that the extradition request was made by a totalitarian regime for persons who were opposed to it. The Swiss courts have reached a similar conclusion under the predominance test. In a case decided in 1952,[20] the Yugoslav Government

16. Fed. Trib., Switz., [1933-1934] Ann. Dig. 369 (Case No. 157). There, the court denied an extradition request, reasoning that "acts which have the character of an ordinary crime appearing in the list of extraditable offenses but which, because of the attendant circumstances, in particular because of the motive and the object, are of a predominantly political complexion" were to be considered political offenses. *Id.* at 370.

17. Regina v. Governor of Brixton Prison *ex parte* Kolczynski and Others, [1955] 1 Q.B. 540.

18. *Id.* at 542.

19. *Id.* at 543.

20. In re Kavic, Bjelanovic & Arsenijevic, Fed. Trib., Switz., [1952] I.L.R. 371 (Case No. 80).

requested the extradition from Switzerland of three of its nationals who had hijacked an airplane and sought asylum in Switzerland. The Federal Tribunal denied the extradition request, arguing that the purpose and the motive of the hijacking — to flee a totalitarian regime — gave the offense "a distinctly political colouring".[21]

Despite this liberal application of the political offense exception in these special circumstances, it should be stated clearly that neither the English nor the Swiss methodologies have been used in other settings to characterize terrorist or terrorist-like acts as political crimes. In an early English case,[22] the divisional court granted the request for the extradition of an anarchist who had bombed a café and an army barracks in France, notwithstanding the argument that, since the bombing of the barracks constituted an attempt to destroy government property, it was a crime of a political character. The court dismissed that contention, deeming that anarchists were "the enemy of all Governments" [23] and that a criminal act could be considered a political offense, in most cases, only when it was committed in the context of a two-party struggle for political power.[24] Following this line of reasoning, the Swiss courts also have limited the expansive interpretation of the political offense exception to situations involving flight from a totalitarian regime; in other circumstances, they have ruled that terrorist or terrorist-like acts fall without the purview of the political offense exception. For instance, in the *Kaphengst* case,[25] a Swiss court granted the extradition request of the Prussian Govern-

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21. *Id.* at 372.

22. In re Meunier, [1894] 2 Q.B. 415.

23. *Id.* at 419.

24. The court stated that, in order for there to be a political offense, "there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that . . . the offense is committed by one side or the other in pursuance of that object . . . ." *Id.*

25. Fed. Trib., Switz., [1929-1930] Ann. Dig. 292 (Case No. 188).

ment for an individual who claimed to have committed crimes of a political character. The accused and his accomplices had perpetrated a number of bombing outrages in which an innocent person had been injured and substantial damage was caused to private property. Kaphengst, however, alleged that his acts constituted political offenses since they purportedly had been committed to further the ends of a political movement.[26] The Swiss court disagreed; it deemed the acts in question to be purely terrorist acts and ruled that the actor's alleged political motivation could not constitute a justification of his criminal conduct since the means he employed were not proportionate to the aim sought.[27] Accordingly, even under the flexibility of the predominance test, where particularly heinous and violent acts are involved, the political motive and purpose of the offender will not be determinative of the character of his crime.

Finally, the French courts in their early decisions espoused the application of an objective test which limited political offenses to those crimes which directly injure the rights of the State, that is, to what have been called purely political crimes. The objective definition of a political crime was deployed in the *Gatti* decision [28] and in a series of cases involving the extradition of Belgian nationals who had fled to France after having been accused of war-time collaboration with the enemy.[29] Shortly thereafter, the French courts, uneasy about the restrictiveness of the objective test, began to move towards the adoption of a test which closely paralleled the predominance approach of the Swiss

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26. *Id.*

27. The court concluded that "the danger to innocent people brought about by the bomb outrages . . . (was so) predominant . . . as to prevail completely over the political aspect of the act." *Id.* at 294.

28. Ct. of Appeal, Grenoble, Fr., [1947] Ann. Dig. 145 (Case No. 70).

29. *See, e.g.*, In re Spiessens, Cour d'appel, Colmar [1953] Recueil Dalloz, *Jurisprudence* [D. Jur.] 604, 43 Revue Critique de Droit International Privé [R.C.D.I.P.] 854 (1954).

courts. This reorientation of the French jurisprudence was apparent in the *Rodriguez* case.[30]

In *Rodriguez,* the Spanish Government requested the extradition from France of two of its nationals who allegedly had engaged in serious criminal activity in Spain — they were wanted, *inter alia,* on charges of arson and murder. The accused opposed the extradition request, contending that the Spanish Government had fabricated these charges in order to prosecute them for their opposition to the Franco regime.[31] Upon the basis of evidence indicating that both men were part of organized movements seeking to overthrow the existing Spanish regime, the *Cour d'appel* of Paris refused to grant the extradition request, concluding that the crimes for which extradition was sought were at least relative political offenses.[32] To arrive at its conclusion, the French court appears to have relied upon criteria similar to those used in applying the predominance test — in effect, weighing the political aspects of the crimes in question and the circumstances in which they were committed against their common elements to reach an assessment of their predominant character.

The doctrinal methodology advanced by the *Rodriguez* court was adopted in subsequent extradition cases. Several years later, in the *Hennin* case,[33] a French court again made use of a flexible predominance-like doctrine to assess the political character of the extraditable offenses against the accused. Here, the Swiss Government had lodged an extradition request for one of its nationals who was wanted for arson and other charges. To defeat the granting of the request, the accused contended that his acts had been

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30. Cour d'appel, Paris, [1953] 2 GAZETTE DU PALAIS, *Jurisprudence* 113.

31. *Id.*

32. *Id.* at 114.

33. Cour d'appel, Paris, [1967] Juris-Classeur periodique, la seaime juridique [J.C.P.] II No. 15274. The account of the facts and the holding of the case are taken from the preceding source; no other citations will be given since the source contains no page references.

committed with a political motive and in a purely political context. Additional documentation supplied to the court established that Hennin, in addition to having no criminal record, was a political fanatic with unbending political convictions whose acts had been committed in the context of an intense local political climate. Despite the terrorist-like character of Hennin's acts, the *Cour d'appel* of Paris ruled that his crimes, however regrettable and blameworthy they might be, were acts which had been committed from a political motive and for a political purpose, exempting the accused from extradition.

The same court applied a similar doctrine in the *Inacio da Palma* case.[34] There, the Portuguese Government sought the extradition of one of its nationals for the charge of armed robbery. The accused, however, maintained that his crime had been done for a political purpose. Additional information requested by the court established that da Palma had been tried previously in Portugal for crimes of a political character and that he had a reputation as a political militant. Relying upon this additional information, the *Cour d'appel* denied the extradition request, reasoning that the crime for which extradition was sought was connected to the accused's political activity and that, despite its serious character, it was a political offense. This liberal application of the political offense concept indicates that the contemporary French courts have disregarded the objective definition of a political crime and that they are placing increasing importance upon the right of asylum and the freedom of expression and, as a consequence, lessening the former emphasis placed upon the international interest in the repression of criminality.

The *Astudillo-Calleja* case,[35] the most recent decision

34. Cour d'appel Paris, [1967] J.C.P. II No. 15386. The account of the facts and the holding of the case are taken from the preceding source; no other citations will be given since the source contains no page references.

35. Conseil d'Etat, Paris, 105 J. DR. INT'L-CLUNET 73 (1978) (Ruzié, *Note*, *id.* at 76); [1977] Recuil Dalloz-Sirey, Jurisprudence [D.S. Jur.] 699

(1977) in this area from the *Conseil d'Etat,* confirms the existence and strength of this evolution. In that case, the Spanish Government requested the extradition of the accused on bank robbery charges and for other thefts. Austudillo-Calleja, however, long had been a political militant opposed to the Spanish regime: his parents had been Spanish republicans who had died for their cause; he had served a prison term for his refusal to be inducted into the army; finally, he had received additional prison sentences for charges relating to the dissemination of political propaganda against the government and the army.[36] In 1973, when he fled to France after committing several thefts in Spain, the Spanish Government requested his extradition. Two years later, a French court of appeal, agreeing with the Spanish Government's contention that the acts of the accused could not be considered, in objective terms, to be political offenses, held that he should be extradited since his acts were common crimes.[37] On appeal, the *Conseil d'Etat* reversed that decision, ruling that, in light of the accused's past opposition to the Spanish regime, the extradition request had been made to serve a political end.[38] This result indicates that the higher court intended to afford the accused the right of asylum despite the manifestly criminal character of his acts.[39] From a comparative perspective, there is reason to believe that the outcome of this case aligns itself with the holding of those cases in English and Swiss practice [40] in which an expansive interpretation was given to the political offense exception in order to permit the accused to escape from a totalitarian

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(de Genevois, *Conclusions, id.* at 695); [1977] 2 GAZETTE DU PALAIS *Jurisprudence* 640 (Mohamed Ladhair, *Note, id.* at 640).

36. *See* [1977] D.S. Jur., *supra* note 35, at 695.

37. *See id.* at 695, 699.

38. *See id.* at 699.

39. *See* [1977] 2 GAZETTE DU PALAIS, *Jurisprudence, supra* note 35, at 642.

40. *See* text at notes 17-21 *supra.*

regime. It should be recalled that the extradition request was initiated at the time when Franco held power in Spain.

There are a number of conclusions which can be drawn from this survey of the French case law dealing with the application of the political offense exception in extradition litigation. The evolution of the cases points to the fact that French courts no longer regard the objective test advocated by the *Gatti* court [41] as the applicable law in these matters. Although a precise characterization of the current French approach remains somewhat elusive, the French courts undeniably have given themselves a wide measure of discretion in deciding these cases — a feature which resembles the ad hoc approach characteristic of Swiss practice. Although they do not neglect to take into account the seriousness of the crime and its common elements, the French courts also look to the circumstances surrounding the act and the extradition request, as well as the offender's motivation and the relationship between the means employed and the ends desired. It should be noted that the provisions of the applicable extradition statute [42] allow the courts to deny an extradition request not only upon the ground that the crime of the accused constitutes a political offense, but also when the court deems that the extradition request was made to promote a political end.[43] By adopting an ad hoc and flexible definition of the concept of a political offense and of the political end that can underlie an extradition request, the French courts have emphasized the subjective and circumstantial character of the cases involving the extradition of would-be political offenders and lessened the importance formerly attached to the international repression of criminal activity by the objective test.

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41. *See* text at note 28 *supra*.

42. Law of March 10, 1927 [1927] J.O. 2874; [1927] 1 GAZETTE DU PALAIS 1019, note 4 *supra*.

43. *See* Law of March 10, 1927, Art. 5(2), [1927] J.O. 2874, 2875; [1927] 1 GAZETTE DU PALAIS 1019, 1019.

The advantage of such an approach is that now the French courts are prepared to recognize and to deal doctrinally with the vexed problem of relative political crimes. However much enlightened this approach may seem, it should be pointed out that its application to cases involving the extradition of transnational terrorists could have serious repercussions upon the international struggle to bring legal sanctions to bear against terrorists. Unlike the English and Swiss case law,[44] there is no clear precedent in the French jurisprudence which establishes that terrorist or terrorist-like acts are without the purview of the political offense exception. The substantive grounds for distinguishing the classical French political offender cases from those cases dealing with the extradition of transnational terrorists are fairly fragile and can be assessed rather arbitrarily depending upon the court's point of view. The former cases, in contrast to the terrorist cases, usually involve the flight of persons from an absolutist country in which the world community recognizes the existence of a dictatorial regime; the acts of these persons usually are not directed at innocent victims or the civilian population generally, and, in a traditional sense, they are a part of organized political opposition movements seeking to express their dissent to the established absolutist political order. The outcome and reasoning of the *Hennin* case[45] indicates, however, that the line between the classical political offender cases and the terrorist cases may not be crystal clear in the eyes of the French courts. There are some grounds for believing that, under certain circumstances, the French courts would not be adverse to denying an extradition request for a terrorist upon the basis of a determination that his acts constituted a political crime. Although there has been some doctrinal hesitation in this area, the distinction between these two types of cases has been made and maintained in the most recent cases dealing

44. *See* text at notes 22-27 *supra*.

45. *See* text at note 33 *supra*.

with the extradition of transnational terrorists and their accomplices.

III. French Judicial Decisions Relating to the Extradition of Transnational Terrorists

During the past five years, the *Cour d'appel* of Paris has rendered decisions in a number of cases involving the extradition of transnational terrorists from France.[46] The evolution of the doctrine in these cases has shifted and, until recently, has not been very stable. In deciding the earlier cases, the court appears not to have been altogether neutral or completely independent in reaching its determinations, apparently allowing its decisions to be influenced by external political circumstances rather than by the facts of and the legal issues raised by the cases themselves. The *Cour d'appel*'s more recent decisions have been more objective and doctrinal in character and supportive of efforts to repress international criminality. Discrediting the would-be political motivation of the terrorists or their accomplices, the court in these decisions has emphasized the need to bring legal sanctions to bear against the perpetrators of heinous criminal acts, deeming them to be intolerable and unjustifiable in civilized society.

The earlier decisions constitute a forceful illustration of the political overtones of the *Cour d'appel's* initial attitude towards the extradition of transnational terrorists. The *Holder* decision [47] was the first case to be decided by the Paris court in this specific area of litigation. There, the U.S. Government requested that France extradite at least two U.S. nationals who were wanted on airplane hijacking charges.[48] The *Cour d'appel*, however, ruled that the

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46. For a list of these decisions, see text at and accompanying note 2 *supra*.

47. Ct. of Appeal, Paris, Fr., E McDowell, Digest of United States Practice in International Law 1975, at 168.

48. *Id.* at 169.

extradition request should be refused, reasoning that the act of the accused was a political offense.[49] The court's application of the political offense exception in the circumstances of this case not only was surprising, but also it was baffling since there was little evidentiary or doctrinal justification for using the concept as a basis of decision. The record contains little or no indication of political motivation on the part of the hijackers: apparently, during the incident, the hijackers demanded that the aircraft be flown in the direction of Hanoi, but, when they were provided with a plane that could fly that distance, they changed their mind; in addition, they had made some vague allusions to Angela Davis and Eldridge Cleaver during the episode.[50] It is upon the basis of this weak circumstantial evidence that the Paris court ruled that the two fugitives were wanted for a political offense, despite U.S. Government contentions that hijacking was an ordinary criminal act especially when it resulted in the extortion of $500,000 from the airline company.[51]

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49. *Id.*

50. *Id.* at 171.

51. *Id.* Another incident involving transnational terrorists took place in France between the *Holder* and *Abu Daoud* cases, but apparently did not involve a judicial pronouncement on an extradition request. This incident involved French Government action relating to the apprehension of Croation nationalists who had hijacked an airplane in the United States and had surrendered at Charles de Gaulle airport in Roissy France. The surrender of the Croation terrorists followed a twelve-hour stalemate during which French police authorities blew out the tires of the airplane and stated that they would not allow the airplane to take off under any circumstances. According to press reports, the U.S. Ambassador to France stated that the hijackers were given the option of returning to the United States for trial. Apparently, they accepted that option; on September 12, 1976; they were apprehended by French police and then flown to New York City by the French Government and arrested by FBI agents for the charge of air piracy. Rather than involve the making of an extradition request and its consideration by the *Cour d'appel,* this incident, given the rapidity of the action taken, appears to have involved the simple expulsion of the terrorists by the French Government from the the French territory. In a telephone interview, the

The facts of the case revealed, on the one hand, a somewhat confused intention to hijack an airplane and, on the other hand, conduct that was manifestly criminal in character. Since the political coloration of the venture was at best only vaguely apparent, if not completely invisible, the court appears to have engaged in a rather lax and arbitrary application of the political offense exception. In fact, the substance of the decision smacks of something other than a judicial pronouncement based upon doctrine pure and simple; its underlying rationale seems to be elsewhere. At the time of the decision, the French Government had become severely critical of the U.S. involvement in Vietnam and, although this interpretation is purely conjectural, the *Holder* outcome seems to have been influenced, possibly mandated, by that external political circumstance. Rather than apply the political offense concept impartially and dismiss it as inapplicable, the *Cour d'appel* appears to have used it as a springboard to act as the spokesman for French national political opinions. These considerations notwithstanding, the doctrine elaborated in *Holder* augured badly for future cases involving the extradition of transnational terrorists from France, standing as an obstacle to efforts to repress international criminal activity.

Although it did not involve a consideration of the political offense exception — its holding being limited to purely procedural matters — the *Abu Daoud* case,[52] a second early decision, reinforced the negative conclusions that could be drawn from the *Cour d'appel*'s attitude towards the

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secretariat of the *Cour d'appel* of Paris stated that, to its knowledge, the court did not render a decision in such a matter. There is no reported decision involving the incident in the French case reporters. For an account of the incident, *see, e.g.*, N.Y. Times, Sept. 12, 1976, § A, at 1, col. 6; Sept. 13, 1976, § A, at 1, col. 4; Sept. 14, 1976, § A, at 1, col. 4; Sept. 15, 1976, § A at 89, col. 1.

52. Cour d'appel, Paris, 104 J. DR. INT'L-CLUNET 843 (1977) (Decocq, *Note, id.* at 844); Le Monde, Jan. 13, 1977, at 2, col. 1 (report of the official summary of the opinion). *See also* Roubache, *A Propas de Droit*, [1977] 51-53 GAZETTE DU PALAIS.

extradition of terrorists. The commentary [53] on this decision, emphasizing the court's vulnerability to external political pressure, states almost unanimously that, in this case, the *Cour d'appel* not only echoed the political opinions of the national government, but also acquiesced to executive branch pressure to reach a certain legal result dictated by political considerations. In early January 1977,[54] Abu Daoud, allegedly an organizer of the 1972 Munich Olympics massacre, was placed under provisional arrest in Paris, pending extradition requests from the West German and Israeli Governments. Several days after the arrest, the *Cour d'appel* convened exceptionally on a Monday, sitting in camera, to rule upon the legality of the continued provisional detention of the suspected terrorist. After a fairly rapid deliberation, the court agreed with the principal defense arguments that the West German arrest warrant and the forthcoming Israeli extradition request were invalid upon a number of extremely technical legal grounds, ruling that Abu Daoud should be released.[55]

Many Western Governments and journalists assailed the outcome and reasoning of the decision as having been politically motivated; [56] there was a general consensus that the court had yielded to the pressure of the French Government which, in turn, had succumbed to possible Arab oil threats, terrorist blackmail and other factors.[57] Although evidence

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53. *See, e.g.,* Rubin, *Abu Daoud Case: Flouting World Law,* Christian Science Monitor, Jan. 27, 1977, at 31, col. 1; Note, *The Abu Daoud Affair,* 2 J. Int'l L. & Econ. 539 (1977); Recent Developments, *International Terrorism: Extradition,* 18 Harv. Int'l L.J. 467 (1977). *See also* Le Monde, Jan. 12, 1977, at 3, col. 1; N.Y. Times, Jan. 12, 1977, § A, at 20, col. 1; The Times (London), Jan. 12, 1977, at 1, col. 1.

54. For an account of the facts of the case, *see, e.g.,* N.Y. Times, Jan. 14, 1977, § A, at 1, col. 4.

55. *See, e.g.,* Le Monde, Jan. 13, 1977, at 2, col. 1.

56. *See* text at and accompanying note 53 *supra.*

57. For a detailed account of this incident and these other factors, see Note, *The Provisional Arrest and Subsequent Release of Abu Daoud by French Authorities,* note 1 *supra.*

of direct interference cannot be brought forth, the technical character of the procedural holding and the other circumstances of the decision indicate that political factors were present and that the most plausible explanation for the decision is executive interference with the theoretically independent judiciary. In the final analysis, the *Abu Daoud* case not only underscored the difficulty, if not the impossibility, of reconciling the immediate interests of a State with the long range goals of a coherent international policy against transnational terrorism, but also made evident the *Cour d'appel*'s reticence to exercise a measure of judicial autonomy in these cases and to formulate a doctrine that responded independently to the circumstances — political or otherwise — of the terrorist extradition cases.

The outcome and reasoning of the *Klaus Croissant* case,[58] the first decision in a second group of cases, presaged a significant reorientation in the *Cour d'appel*'s general attitude and jurisprudence relating to the extradition of terrorists. On September 30, 1977, the Paris police arrested Croissant,[59] a West German national and a former attorney for members of the Baader-Meinhof gang. The arrest was based on an international warrant issued by a Stuttgart court, charging, *inter alia*, that Croissant had aided a criminal group and propagandized on its behalf. Later, the West German Government requested Croissant's extradition, referring to the charges contained in the Stuttgart warrant and in another international warrant issued by a Karlsruhe court which implicated the accused more directly in subsequent terrorist incidents. On November 16, 1977, the *Cour d'appel* rendered a "partially favorable" decision in which it stated that Croissant could be extradited "for [his] having, as a lawyer, contributed to organizing and operating an

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58. No official report of the *Cour d'appel*'s decision in this case has been published as yet. For an account of the opinion, *see, e.g.*, Le Figaro, Nov. 17, 1977, at 17, col. 3.

59. For an account of the facts of this case, *see, e.g.*, Le Monde, Oct. 2-3, 1977, at 7, col. 1; Oct. 5, 1977, at 16, col. 5; Nov. 26, 1977, at 1, col. 3.

information system between imprisoned terrorists and others in liberty by transmitting correspondence, instructions and documents favoring, as a consequence, their activities." [60]

In *Croissant*, the *Cour d'appel* did not yield to any external pressure and reached a determination in which it applied legal doctrine and assessed the circumstances of the case impartially. In doing so, it reached the conclusion that legal sanctions should be brought to bear against an individual who had allegedly aided and abetted terrorists in their activities. In subsequent litigation, in which Croissant contended that he was a political offender, the *Conseil d'Etat* [61] upheld the legality of the French Government's decision to extradite the West German lawyer, reasoning that the charge of furnishing aid to persons who committed crimes was not political in its purpose despite the fact that the purpose of the crime was described in the arrest warrant as "to topple the established order in the Federal Republic of Germany".[62] Moreover, the *Conseil d'Etat* concluded that the allegation that the act of the accused had been committed in order to have the rights of defendants respected was not sufficient to give the infraction a political character. Finally, the court ruled that the aid furnished to imprisoned individuals had allowed them to pursue their criminal activity and that the seriousness of the charge prevented it from having a political character.[63]

The reasoning in this decision focuses squarely upon the relationship between the political offense exception and terrorist acts or complicity with such acts; its key element is that the seriousness of terrorist crimes, the fact that they jeopardize the interest in the protection and preservation of

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60. *See, e.g.*, Le Figaro, Nov. 17, 1977, at 17, col. 3.

61. Conseil d'Etat, Paris, 106 J. DR. INT'L-CLUNET 91 (1979) (Ruzié, *Note*, *id.* at 96).

62. *See id.* at 94-95.

63. *See id.*

society, discounts — more precisely, eliminates — their possible political character. In a word, according to the reasoning of the *Conseil d'Etat*, complicity with terrorist activities and, by implication, terrorist acts themselves cannot be deemed to be relative political crimes and terrorists cannot lay claim to the political offense exception simply because of the menace that terrorist acts pose to society. Such reasoning does not unduly restrict the category of relative political crimes. In an *Astudillo-Calleja* situation[64] involving the commission of ordinary crimes because of an individual's opposition to a totalitarian or otherwise absolutist regime, the courts should retain some discretion to make a choice between the individual's right to asylum and the State's interest in repressing criminal activity. In a *Hennin*-like situation[65] or, even more, in a *Holder* context,[66] however, where the potential extraditee has engaged in common criminal activity within the framework of a free and democratic society, the judiciary should apply the political offense concept more restrictively and not allow the would-be political coloration of these acts to stand as an obstacle to extradition. The important teaching of the decision of the *Conseil d'Etat* appears to be that, where viable channels of free political expression exist, there is little or no justification for wanton violent acts regardless of the alleged motivation that inspires them. In the final analysis, Croissant, whatever his personal political convictions may have been, engaged in criminal activity by aiding criminals to commit their crimes; conduct which merits the application of the appropriate legal sanctions.

A consideration of the decisions in two companion cases concludes this analysis of the relevant French case law. The

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64. *See* text at notes 35-40 *supra*.

65. *See* text at note 33 *supra*.

66. *See* text at notes 47-51 *supra*.

Piperno[67] and the *Pace*[68] cases are the latest French terrorist extradition decisions, and they confirm the view that, since *Croissant*, French jurisprudence in this area has undergone a marked doctrinal reformulation. Apparently, the *Holder* doctrine is being left aside, and a concept of the political offense exception is being elaborated which lessens, and perhaps eliminates, the possibility that terrorist or terrorist-like acts could be included among the category of political crimes. In addition, and this possibly points to the reasons for the shift in doctrine, the *Cour d'appel* is asserting its autonomy in these matters and disregarding external political factors. The results in *Piperno* and *Pace* demonstrate that the court is not only aligning itself with the dominant trend among the courts of the world community in excluding terrorist crimes from the purview of the political offense exception,[69] but also is moulding its decisions in the spirit of the 1977 European Convention on the Suppression of Terrorism.[70]

Both the *Piperno* and the *Pace* cases arose as a result of a special investigation currently being conducted by international police authorities to apprehend Red Brigades terrorists who are believed to be hiding in France and who are suspected of having participated in the assassination of Aldo Moro.[71] The *Piperno* case involved two extradition requests made by the Italian Government for Francesco

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67. No official report of the decision has been published as yet. For an account of the opinion, *see* Le Figaro, Oct. 18, 1979, at 14, col. 6; Le Monde, Oct. 19, 1979, at 1, col. 5. For the analysis of the opinion, the author has relied upon an official copy of the court's opinion.

68. No official report of the decision has been published as yet. For an account of the opinion, *see* Le Figaro, Nov. 8, 1979, at 14, col. 5; Le Monde, Nov. 9, 1979, at 17, col. 1. For the analysis of the opinion, the author has relied upon an official copy of the court's opinion.

69. *See* text at and accompanying note 7 *supra*.

70. European Convention on the Suppression of Terrorism, *opened for signature*, Jan. 27, 1977, *reprinted in* 15 INT'L LEGAL MATERIALS 1272 (1976).

71. *See* Int'l Herald Tribune, Sept. 4, 1979, at 5, col. 1.

Piperno, an Italian national and radical left-wing militant who had acted as a sort of intermediary between Italian officials and terrorists when the latter were negotiating on the fate of Aldo Moro. On April 7, 1979, Piperno went into hiding after he was charged with insurrection against the State and with membership in an urban guerrilla group. On August 18, 1979, Piperno was apprehended in Paris and detained upon the basis of an Italian arrest warrant; the Italian Government then made a request for Piperno's extradition for the insurrection and subversive activities charges.[72]

On August 31, 1979, the *Cour d'appel* of Paris rendered a decision, rejecting the extradition request on the ground that the charges upon which the extradition request had been made were not among the enumerated offenses contained in the Franco-Italian Extradition Convention and were not within the scope of the French Extradition Statute.[73] This result was anticipated since the Italian Government, a few days before, had made a second extradition request upon the basis of forty-six specific charges, including accusations of direct involvement in the murder of Aldo Moro.[74]

On October 17, 1979, the *Cour d'appel* rendered a "partially favorable" decision on the second extradition request, limiting the grounds for extradition to the two charges relating to Piperno's alleged complicity in the sequestration and murder of Aldo Moro.[75] A substantial portion of the court's opinion considered defense arguments that the second extradition request was based upon the same charges as

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72. *See id.*, Sept. 3, 1979, at 6, col. 6; Le Monde, Sept. 27, 1979, at 14, col. 4; Le Figaro, Aug. 20, 1979, at 3, col. 1; Le Monde, Sept. 2-3, 1979, at 20, col. 2.

73. *See* Le Monde, Sept. 2-3, 1979, at 20, col. 2; Int'l Herald Tribune, Sept. 3, 1979, at 6, col. 6.

74. *See* text at and accompanying note 73 *supra*.

75. *See* Le Figaro, Oct. 18, 1979, at 14, col. 6; Le Matin, Oct. 18, 1979, at 1, col. 6; Le Monde, Oct. 19, 1979, at 1, col. 5.

the first request and, in turn, should be denied.[76] The court discredited those allegations. In terms of doctrine, the more significant part of the opinion concerned the would-be political character of the acts of the accused and of the extradition request. In the court's view, the two charges for which extradition could lie -- complicity in the sequestration and murder of an innocent person — were ordinary criminal acts. Because of the "extreme seriousness" of the crimes, neither the motivation which inspired them nor the circumstances in which they were committed could dispel their common or ordinary aspect: "the court notes the extreme seriousness of the charges . . . [W]hatever the purpose of such acts and regardless of the context in which they might be placed, they may not, in view of their seriousness, be considered political in nature." Relying upon the language of a provision of the French Extradition Statute which provides for extradition when heinous acts of barbarity are committed during an insurrection or a civil war, the court reasoned that

> if the aforesaid law precludes justification for political reasons of the most serious acts even when committed during a period of declared violence such as an insurrection or a civil war, there would thus be even less justification for them in the absence of such extreme circumstances when the legal institutions of the requesting country are operating fully and normally.

Despite its brevity, the court's reasoning was unequivocal. Much like the *Conseil d'Etat* in the *Croissant* case,[77] the *Cour d'appel* in *Piperno* insisted upon the threat that terrorist acts present to society. According to the court,

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76. For the text of the court's opinion, the author has relied upon an official copy. *See* text at and accompanying notes 2 and 67 *supra*. No further citation to that official copy will be made; all paraphrases and quotations have been taken from the text of the official copy.

77. *See* text at notes 58-66 *supra*.

these acts not only were criminal in character, but also constituted a type of criminality which was particularly odious in nature. Under the court's interpretation of the political offense exception, complicity in the moral and physical torture and subsequent assassination of an innocent person could not be justified by the contention that such an act was the expression of political beliefs. Although the court never stated so explicity, one could assume that the ends pursued were simply too disproportionate with the means employed for the act to be considered as a political crime. Finally, the principle of speciality effectively dispelled any concern about the possible political motivation of the extradition request itself.

The Italian Government also had made an extradition request for Lanfranco Pace, a political associate of Mr. Piperno who had been apprehended in Paris as well. On November 7, 1979,[78] the *Cour d'appel* rendered an almost identical opinion in the *Pace* case, giving a "partially favorable" decision and limiting the extraditable charges to those crimes relating to the accused's complicity in the sequestration and murder of Aldo Moro. Again, the court deemed the political offense exception to be inapplicable in light of the "extreme seriousness" of the charges; using the same reasoning as in the *Piperno* decision, the court concluded that "whatever aim was sought or the context in which such facts can be integrated, the latter [the acts], in light of their seriousness cannot be regarded as having a political character". In the court's view, the political offense exception, although capable of being defined with flexibility and on an ad hoc basis in response to differing circumstances, was not designed to cover savage or inexcusable acts which are repugnant to universal human feelings. Complicity with terrorist activities constitute such reprehensible acts and the contemporary international

78. No official report of the decision has been published as yet. For an account of the opinion, *see* Le Figaro, Nov. 8, 1979, at 14, col. 5; Le Monde, Nov. 9, 1979, at 17, col. 1.

political and intellectual climate only reinforces such a point of view.

IV. Conclusions

Despite its conclusions in *Holder* and its handling of the *Abu Daoud* case, the *Cour d'appel*'s doctrinal holding on the political offense question in *Piperno* and *Pace*, like the reasoning of the *Conseil d'Etat* in the *Croissant* case, is an invaluable judicial statement in the struggle to bring legal sanctions to bear against transnational terrorists and their accomplices. While the court made no explicit reference to a specific test in elaborating its doctrine on the political offense question, it appears to be clear that it was deploying a set of criteria similar to that used in the Swiss predominance test by weighing the common aspects of the crime against its political features. More importantly, the court seems to have established conclusively that, even when the liberal requirements of a predominance-like test are applied, terrorist or terrorist-like acts will fall outside of the scope of the political offense exception to extradition. This position not only supports the basic spirit of the 1977 European Convention on the Suppression of Terrorism, but also is in keeping with the rulings of other national courts which have held that terrorist acts are an inappropriate and unacceptable means of political expression in free and democratic societies. The violence and cold-bloodedness that such acts involve make them a disproportionate means to achieve any alleged political end simply because they pose such an invidious threat of harm and destruction to innocent persons and civilization in general. The reorientation of the French jurisprudence by the decisions in *Croissant, Piperno* and *Pace* is a welcome — and one hopes a definitive — change in this area of litigation and should be taken to serve as the expression of the French judiciary's recognition of the need to bring legal sanctions to bear against terrorist offenders.

B. Obtaining Evidence

Obtaining Foreign Discovery and Evidence in U.S. Antitrust Cases: The Uranium Cartel Maelstrom

Sigmund Timberg

The extraterritorial enforcement of the U.S. antitrust laws has generated more diplomatic protest, more public outcry and more international law controversy over the last four decades than any other foreign economic policy pursued by the United States. For the uninitiated international lawyer or Foreign Service official who does not realize that antitrust is a way of life in the United States and part of its *ordre publique*, the figure that emerges of the United States is that of a legal Amazon, leaping across the Atlantic with a judicial sword directed against non-U.S. firms for their activities outside the United States. This judicial Amazon is perceived to threaten these international firms (following what they thought were reasonable and customary business procedures, usually tolerated if not encouraged by their own governments) with prosecution in a U.S. court for violating an exotic product of the U.S. legal imagination called the Sherman Act.

Since World War II, many jurisdictions, including Germany, the United Kingdom, France, Japan, Australia, and the nine-member European Economic Community, have enacted substantial antitrust legislation, so that antitrust and competition policy is no longer uniquely linked with the United States. But U.S. efforts to obtain evidence in a foreign country for use against that country's nationals continue to arouse deep resentment.

This has been true even in the case of Canada, a country which adopted its first antitrust law in 1889, one year

before the Sherman Act was enacted, and which has a pro-competitive philosophy similar to that of the United States, although the coverage of its law is narrower and the zeal of its government and citizens for antitrust litigation is much more subdued. As far back as the late 1940s, the Department of Justice issued a number of subpoenas to Canadian enterprises engaged in the production of paper and pulp. This use of extraterritorial process provoked critical comment in the Canadian newspapers, which denounced it as an invasion of national sovereignty, "judicial aggression" and "judicial imperialism." [1] Among the leading defenders of Canadian national sovereignty was a Congressman from Michigan. This may seem strange, unless one appreciates that the Canadian companies served with these subpoenas were preponderantly the subsidiaries and branches of U.S. parent companies.

In 1959, came the *Canadian Electronics Patent Pool* case, brought by the United States against Westinghouse, General Electric and N. V. Phillips, multinational corporations engaged in the manufacture and sale of radio and television sets, articles of commerce highly protected by patents. The charge against these three defendants was that their Canadian subsidiaries had pooled their patents and had refused to license the pooled patents to U.S. exporters of radio and TV sets (such as Zenith) thereby keeping U.S.-produced sets out of the Canadian market. This case had immediate diplomatic repercussions. The Canadian Minister of Justice, Mr. Fulton, came to New York where he talked to members of the antitrust bar, and to Washington where he talked to the Attorney General, Mr. Brownell, and worked out an official concordat providing for continuing consultations between U.S. and Canadian antitrust enforcement officials.[2]

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1. *Hearings Before the Subcomm. on Study of Monopoly Power of the House Comm. on the Judiciary*, 81st Cong., 2d Sess., ser. 14, pt. 6-B (1950).

2. Both the facts of the *Canadian Electronic Patents* case and the

Instead of striking the more abstract note of violation of international law that had characterized complaints from other governments and parties displeased by U.S. extraterritorial enforcement, Mr. Fulton stressed the bad international relations caused by the *Canadian Electronics Patent* case. He struck a particularly poignant note when he mourned "... the increasingly lugubrious position of the poor [international] director ... stretched and shackled, as it were, over the international boundary, with Washington putting lighted splinters under his toenails and Ottawa tearing off his fingernails." [3]

One of the consequences of the Canadian umbrage at the Justice Department's use of subpoenas directed at Canadian enterprises was the passage, by the provinces of Ontario and Quebec, of Business Records Protection Acts, forbidding the export of business records and documents in response to governmental process issuing from any foreign (meaning U.S.) judicial, legislative or administrative organ.[4] Similar statutes prohibiting the export of business records were enacted by the United Kingdom and West Germany, in 1964 and 1965,[5] in response to a grand jury investigation of multinational shipping conferences. A Netherlands law, passed in 1956, likewise had declared an embargo on the shipment abroad of corporate records,[6] in

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nature of cooperative arrangements between the Canadian and U.S. antitrust officials worked out in 1959, and later in 1969, are summarized in COMMON MARKET AND AMERICAN ANTITRUST 443 (J. Rahl ed. 1970). *See also* Timberg, *Conflict and Growth in the International and Comparative Law of Antitrust*, Section of International and Comparative Law Bulletin, July 1960, at 20.

3. Rahl, *supra* note 2, at 445-46.

4. Quebec Business Concerns Records Act, 4 QUE. REV. STAT. c. 278 (1964); Ontario Business Records Protection Act, 1 ONT. REV. STAT. c. 44 (1960).

5. British Shipping Contracts and Commercial Documents Act, 1964, c. 87; Law of May 24, 1965, § 11, [1965] Bundesgesetzblatt [BGB1] II 835 (W. Ger.). *See* In re Grand Jury Investigation of the Shipping Industry, 186 F. Supp. 298 (D.D.C. 1960).

6. Law of June 28, 1956, [1965] Staatsblad voor het Koninkrjk der

response to a suit by the Department of Justice against N. V. Phillips, the largest Dutch national, for its part in the *Canadian Electronics Patent Pool* antitrust case.

Despite the existence of these statutory bans on the export of documents to the United States and the strong protests made by foreign governments in several leading cases, the Justice Department is usually able to obtain documents, on a voluntary basis, from foreign business concerns that transact substantial business in the United States and are therefore subject to the venue and personal jurisdiction of the U.S. courts. But obtaining the testimony of the foreign-based officers and directors of such foreign-based firms is an entirely different matter. Consider the case of the Vice President of a Dutch drug company who was arrested at Kennedy Airport and hauled before the Federal District Court in Manhattan the next day.[7] He and his company were named defendants in the criminal indictment brought by the Antitrust Division against the companies and individuals involved in the International Quinine Cartel, and were therefore on a list given by the Antitrust Division to the immigration authorities. The arrest is indicative of attempts to secure the necessary corroborative evidence in an antitrust case from foreign persons not subject to the jurisdiction of the U.S. courts, even where, as here, minutes of the cartel meetings were available to the government, having been obtained by the Senate Judiciary Antitrust Subcommittee in the course of committee hearings.

When the Dutch businessman appeared in the federal court, the Justice Department suggested to the judge that he be released on $100,000 bail. The judge originally demurred on the ground that the businessman's "pecuniary liability" under the criminal proceeding pending against

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Nederlanden [Stb.] 1061 (Neth.), *as amended*, Law of July 16, 1958, § 39, [1958] Stb. 413 (Neth.).

7. U.S. v. N. V. Nederlandsche, 2 TRADE REG. REP. (CCH) ¶ 75,434 (S.D.N.Y. 1974).

him was $165,000.[8] This unusual colloquy points up another difficulty inherent in U.S. extraterritorial antitrust enforcement. In addition to equity suits that may be brought by the Justice Department, the Sherman Act may also be enforced by criminal felony proceedings which, under recent amendments to the law, involve corporate fines not to exceed $1 million, individual fines not to exceed $100,000 and prison sentences not to exceed three years.[9] Although the Common Market has levied some sizable civil penalties against members of international cartels, this criminal aspect of U.S. antitrust enforcement has no counterpart in the antitrust jurisprudence of other industrial countries. The *International Quinine Cartel* case never went to trial, and such fines as were paid by the defendants were the result of consent settlements.

The third and most intimidating form of antitrust enforcement is the private treble damage proceeding that is available to private persons injured in their business or property by an antitrust violation, which may result in damage awards running into millions of dollars, plus heavy liabilities for attorneys' fees.[10] Both the treble damage and criminal proceedings were involved in the controversial litigation we are now about to consider.

Although diplomatic friction and strong language had resulted from some prior efforts at the extraterritorial enforcement of the U.S. antitrust laws, the most vehement and widespread denunciation of the U.S. initiative in the antitrust area was aroused by the recent *Uranium Cartel* litigation. Anglo-Saxon law is, in Jeremy Bentham's piquant language, the science of being methodically ignorant of what everybody knows, so a word of apology is in order for referring to a group of twenty-nine antitrust defendants as members of a "cartel"; these defendants, although

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8. *Id.* ¶ 98,460.

9. 15 U.S.C. § 1 (1976).

10. 15 U.S.C. § 15 (1976).

involved in three different legal proceedings — equity injunctions, criminal and treble damage proceedings — have thus far not been adjudicated to be cartellists.

The minutes of the alleged uranium "cartel" were obtained by an Australian environmental organization called "Friends of the Earth," and eventually came into the possession of the U.S. Government and a not insubstantial multinational corporation, Westinghouse Electric. Westinghouse was in a very awkward economic position, because it had contracted to supply enriched uranium to twenty-odd U.S. utilities at a time when the U.S. and world market price for the "yellow cake" was $6.00 a pound. As a result of the formation of the cartel, the price had risen to $41.00 a pound. When sued by the electric utilities (in the Federal District Court in Richmond, Virginia) for failure to deliver the uranium pursuant to its contractual commitments, Westinghouse pleaded as a defense that the operations of the uranium cartel had made the performance of its contracts "commercially impracticable." It also brought a treble damage action in Chicago charging twenty-nine uranium producers, predominantly non-U.S. nationals located outside the United States, with having violated the Sherman Act by participating in the uranium cartel. Two billion dollars are claimed in the lawsuits brought by the utilities against Westinghouse, and the stakes in the antitrust litigation subsequently brought by Westinghouse are also very high.

What triggered the international furor was Westinghouse's efforts to procure, from non-U.S. sources, documents and testimony that would substantiate the existence of the cartel. Westinghouse had caused letters rogatory to issue to the Supreme Court of Ontario, seeking its aid in obtaining the business records and in taking the deposition of the president of a Delaware corporation (Rio Algom), which was operating a uranium mine in Utah but had main offices located in Toronto and was the wholly-owned subsidiary of a Canadian company. The

Ontario Supreme Court dismissed the letters rogatory, on the grounds that to enforce them would violate Uranium Information Security Regulations and would tend to impinge on Canada's sovereignty.[11]

Shortly thereafter, a subpoena was issued in Utah on Rio Algom's resident manager in Utah, directing it to produce its president in Utah for the purpose of taking his deposition and of obtaining the business records. Algom's president is a resident of Canada, but it is disputed whether he is a citizen of Canada or the United States. The District Court in Utah overruled Rio Algom's motion to quash the subpoena and held it in contempt for failing to comply with its order directing the production of its president and of documents in its possession. The District Court imposed a fine of $10,000 per day for each day that Rio Algom failed to comply with its discovery order and provided for a physical take-over of Rio Algom's Utah properties in the event that Algom's failure to pay the penalties was "not justified."

On appeal, the Circuit Court of Appeals for the Tenth Circuit, by a 2 to 1 vote, held that the District Court had abused its discretion in adjudging Rio Algom to be in contempt of court and in imposing such severe sanctions.[12] The Circuit Court relied heavily on the *Rogers* case,[13] where the plaintiff had failed to comply with a discovery order for the production of business records, on the ground that the order would violate Swiss law and subject it to sanctions in Switzerland. In that case, the Supreme Court said that a "balancing approach" on a case-by-case basis was the appropriate way of accommodating the principles of the law of the

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11. Re Westinghouse Electric Corp. and Duquesne Light Co., Evidence Act, RSO 1970, c. 151, 16 Ont. 2d 273 (Ont. S. Ct. 1977) (Can.). Rio Algom also requested the consent of the Canadian Minister of Energy, Mines and Resources to release its company's records in Canada, but this request was denied.

12. In re Westinghouse Electric Corporation Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977).

13. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958).

forum with the concepts of due process and international comity. The Tenth Circuit also cited Section 40 of the Restatement (Second) of the Foreign Relations Law of the United States (1965),[14] which sets forth the following limitations on the exercise of enforcement jurisdiction, where two or more states have jurisdiction to prescribe and enforce rules of law:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
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> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

The Circuit Court conceded that the United States had a legitimate interest in obtaining discovery in aid of antitrust enforcement, but ruled that this interest was outweighed by the fact that the non-disclosure regulations adopted by the Canadian government and enforced by heavy sanctions [15]

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14. Section 40 of the ALI Restatement was relied on by the U.S. Court of Appeals for the Second Circuit in United States v. First National City Bank, 396 F.2d 897, 902 (2d Cir. 1968). In that case, the court held that the interest of the U.S. Government in the production, for use in antitrust litigation, of foreign bank records located in Frankfurt, Germany, outweighed any German policy of bank secrecy, fears of economic reprisals by the bank's customers in the event bank secrecy was violated, and the possibility that the bank might suffer civil liabilities under German law.

15. The "normal" penalty for violating the Canadian regulation was a $5,000 fine or two-years' imprisonment, or both. In the event of an indict-

were in furtherance of Canadian national interest in controlling and supervising atomic energy. The Court may have been helped to this conclusion by the fact that Westinghouse had already deposed the officers of other uranium companies and that the discovery sought from Rio Algom "though admittedly of potential significance, is still in a sense cumulative."

Circuit Judge Doyle dissented from the Court's opinion because of Rio Algom's status as a Delaware corporation and because it seemed to do no business in any place other than Utah; because the Canadian security regulations were adopted in 1976 for the precise purpose of preventing discovery in the present litigation; and because the strong policy reasons in connection with the U.S. discovery rules must prevail against the Canadian policy of protecting its local industries from insufficient prices.

But it was in Great Britain that the greatest legal hullabaloo ensued. Judge Merhige, the trial judge in the Richmond case, issued letters rogatory to British companies belonging to the Rio-Tinto Zinc (RTZ) group and nine present or former directors or employees of those companies, which were given effect by an *ex parte* order of the High Court Queen's Bench Division under Section 2 of the Evidence (Proceedings in Other Jurisdictions) Act of 1975. The 1975 Act was adopted in order to implement the Hague International Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (1970), and replaced an 1856 statute which for more than a century had governed the offering of judicial assistance to tribunals located outside the United Kingdom.[16]

The 1975 Act had one feature in common with its 1856 predecessor, which was that it did not cover the wide range

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ment or conviction, the penalty could be a $10,000 fine, or five-years' imprisonment, or both.

16. The author has been involved in one government antitrust proceeding where Justice Department counsel considered the possibility of resorting to letters rogatory.

of documents and testimony that are routinely subject to pre-trial discovery in the United States, but was limited to such items of evidence as were directly and immediately relevant to the matters in dispute and were intended for actual use in judicial proceedings commenced or under contemplation.[17] Accordingly, both in the Court of Appeal and in the final appeal before the House of Lords, where the cause was argued for eight days, considerable concern was expressed whether the order issued by the Queen's Bench Division, even as "blue penciled" by the Court of Appeal, was a "fishing expedition."[18] Two of the five Law Lords finally concluded that the amended order could survive attack as not being a fishing expedition, two of them felt that the deletions from the Queen's Bench Order made by the Court of Appeal did not go far enough, and one Law Lord upheld the provision of the order providing for the taking of testimony but felt that the provision relating to the production of documents was defective.

On the other issues, which were dispositive of the case, the Law Lords were considerably more positive and more united. It was agreed that the two companies were entitled to claim their privilege against the production of documents, since such production would tend to subject them to the fines provided by the European Economic Community for violation of Articles 85 and 86 of the Rome Treaty dealing with restrictive business practices, which were penalties recoverable under the British European Communities Act of 1972. This claim was made pursuant to Section 14 of the British Civil Evidence Act of 1968, and was upheld as a matter of British law.

The Law Lords, like the lower courts, accepted Judge Merhige's determination that the individual directors and

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17. *See* Radio Corporation of America v. Rauland Corporation, [1956] 1 Q.B. 618 (applying the 1856 statute).

18. In re Westinghouse Electric Corporation Uranium Contract Litigation MDL Docket 235, [1978] 1 All England Law Reports [All E.R.] 434.

employees (none of whom were involved as defendants in the Richmond case) were entitled to claim their privilege against self-incrimination under the Fifth Amendment to the Constitution; this was a matter of U.S. law. This constitutional claim was based on the fact that the U.S. government had initiated a grand jury investigation of the Uranium Cartel, thereby adding truly incendiary fuel to a legal bonfire that now included three proceedings — the Richmond contract actions against Westinghouse, the Illinois treble damage proceeding by Westinghouse, and the grand jury invoked by the Justice Department. After Judge Merhige had upheld the constitutional claims of the RTZ individual defendants, the Department of Justice made a decision which it admitted was against its "firm policy — in private litigation, except in the most extraordinary circumstances," but which it felt was justified by the great public importance that it attached to the prosecution of the uranium cartel. It proffered the RTZ individual defendants an immunity from criminal prosecution, pursuant to a statutory procedure which made it incumbent upon Judge Merhige to require their testimony.

This resort by the United States to its criminal jurisdiction precipitated unanimous condemnation by the Law Lords, and led to the unqualified rejection of the Queen's Bench order supporting the taking of evidence under the letters rogatory. The Law Lords concluded that the purpose of the letters rogatory was not to aid the trial of a civil or commercial U.S. proceeding but to furnish evidence that might lead to a criminal indictment. While the 1975 British Evidence Act might apply to criminal proceedings that had already been commenced, it contained no provision that would make it applicable to grand jury proceedings.

More important, the Law Lords asserted that the London proceedings were in aid of the extraterritorial enforcement of the U.S. antitrust laws against British citizens with respect to acts performed outside the U.S., against which the U.K. authorities has protested. In short, the whole pro-

ceeding initiated by Judge Merhige's letters rogatory was an invasion of the jurisdiction and sovereignty of the U.K. which under the Hague Convention of 1970, the British Evidence Act of 1975, and international law principle, the courts were duty bound to reject.[19] The Attorney General of the United Kingdom had expounded this view at great length in the House of Lords debate, and the U.K. courts should follow the lend of the U.K. political branch.

It is clear from the foregoing that the basis for the strong resistance to Westinghouse's search for foreign evidence is not to be found in any theory of international judicial assistance or in any subtle rule of international law. It is to be found in the doctrine of national sovereignty; in the vital economic interests of the foreign sovereign as perceived by the organs of that sovereign — the use of the country's national resources to support its economy and its international balance of payments; and the fact that these foreign interests are at cross purposes with the objectives of U.S. antitrust policy to lower prices to the U.S. purchasers of uranium. As Lord Wilberforce bluntly pointed out: "It is axiomatic that in antitrust matters the policy of one state may be to defend what it is the policy of another state to attack."

The current international law wisdom, where the policies of two competent national jurisdictions conflict, is to recommend a "balancing approach" among the respective national interests involved, such as is present in Section 40 of the ALI Restatement of Foreign Relations Law (mentioned above) and has been formulated, in substantially amplified form, in the recent *Timberlane Products* and *Mannington Mills* cases.[20] Valid as these approaches

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19. Lord Wilberforce cited the classic case of *British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd.*, where injunctive relief was directed by an antitrust court against U.K. sovereignty. *See* Timberg, *Antitrust and Foreign Trade*, 48 NW. L. REV. 411 (1953).

20. Timberlane Lumber Co. v. Bank of America, Inc., 549 F.2d 597 (9th Cir. 1976); Mannington Mills, Inc. v. Congoleum Corporation, 595

are in appropriate factual contexts, they are unrealistic in the Uranium Cartel situation, which involves an outright clash between pro-competitive and protectionist national policies, to be decided utimately on a "winner take all" basis, with no opportunity for mutual accommodation.

One clear inference that can be drawn from the opinions of the Law Lords is that any effort to enforce the penal jurisdiction of the U.S., such as that involved in the Justice Department's initiation of grand jury proceedings, may be tactically unwise, in that it will strengthen the international law case against the extraterritorial reach of U.S. discovery process. In this connection, it is an ironic note that the grand jury investigation was closed out by the mere imposition of a $40,000 fine against Gulf Oil, the leading U.S. defendant, imposed under the older misdemeanor rather than the new felony penal provisions of the

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F.2d 1287 (3d Cir. 1979). In the *Mannington Mills* case, the Court of Appeals for the Third Circuit listed the following factors that it believed should be included in the "balancing process":

> 1. Degree of conflict with foreign law or policy;
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> 2. Nationality of the parties;
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> 3. Relative importance of the alleged violation of conduct here compared to that abroad;
>
> 4. Availability of a remedy abroad and the pendency of litigation there;
>
> 5. Existence of intent to harm or affect American commerce and its foreseeability;
>
> 6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
>
> 7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
>
> 8. Whether the court can make its order effective;
>
> 9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
>
> 10. Whether a treaty with the affected nations has addressed the issue.

Id. at 1297-98.

Sherman Act. Thus, a proceeding that had struck five governments [21] and the Law Lords with such a big bang ended with a whimper.

The Canadian and U.S. responses to Westinghouse's Richmond litigation came from the executive and judicial branches of their governments. Not so with respect to Westinghouse's treble damage lawsuit in Chicago referred to earlier. Nine of the defendant foreign companies that were defendants in that action refused to plead, and had default judgments entered against them by the district court. The validity of these default judgments has been upheld by the Court of Appeals for the Seventh Circuit, but no action has been taken to enforce these judgments because of the circuit court's ruling that, on grounds of judicial economy and possible inconsistency in result, Westinghouse could not proceed to try the issue of damages against the defaulting defendants until after the issue of liability had been tried against the defendants who continued to contest the action.[22]

The issue of jurisdiction with respect to the contesting defendants has still to be decided by the district court. However, with respect to the defaulting defendants, the circuit court ruled that the district court had jurisdiction over the subject matter of the dispute within the meaning of the *Alcoa* case,[23] and was not precluded from exercising

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21. Not only Canada and the United Kingdom, but also Australia, South Africa and France have resisted the extraterritorial reach of U.S. process to documents and evidence located in their countries.

22. Westinghouse Electric Corporation v. Rio Algom, Ltd., 617 F.2d 1248 (7th Cir. 1980).

23. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), where Judge Learned Hand outlined an "intended effects" test, which closely parallels the "objective territorial" principle of international law as expounded in Section 18 of the ALI Restatement of U.S. Foreign Relations Law. The emphasis on "effects" stems from the fact that the uranium subject to the cartel's control was produced outside the U.S., and the meetings at which Westinghouse claims prices were fixed took place in France, Australia, South Africa, Illinois, the Canary Islands and England.

Timberlane Products and *Mannington Mills* that jurisdiction under the "jurisdictional rule of reason" adopted in the cases.[24]

The U.K. response to Westinghouse's treble damage proceeding came from its legislative arm. On March 20 of this year, Queen Elizabeth signed an extraordinary statute, a "Protection of Trading Interests Act."[25] This law strengthens the prior U.K. legislation intended to help corporations resist subpoenas and other official demands for information, by requiring the firms receiving such demands to notify the U.K. Secretary of State and obtain his permission to comply with the demand. The Secretary of State may decline to grant this permission if the information demand infringes on British jurisdiction or prejudices the security of the U.K. or its relations with other nations. Failure to comply with the law may subject a company to a fine of £ 1,000.

The U.K. law also contains a so-called "clawback" provision, under which not only U.K. citizens and companies incorporated in the U.K., but any person carrying on business in the U.K. may seek to recover payments made in a lawsuit above the actual damages sustained by the plaintiffs in the lawsuit. Thus, in the case of a treble damage antitrust award recovered against a British defendant, the British defendant could recover two-thirds of the award. By way of encouraging other countries to adopt similar statutes, the U.K. law provides that, when another nation has a corresponding statute, a corporation of such country may use the British courts to recover the payment of such excess damages.

Governments and private litigators alike lay great stress on the principle of international comity, which supports the "balancing of interest approach" and the "jurisdictional rule of reason" laid down in the *Timberlane Products* and *Mannington Mills* cases and Section 40 of the ALI

24. Note 19 *supra*.

25. 959 ATRR F-1-2 (April 10, 1980).

Restatement. Reacting largely to the resentments unleashed by the *Uranium Cartel* litigation, both the Attorney General and the Associate Attorney General of the United States have endorsed the principle of comity. As illustrations of the new approach to comity, former Attorney General Griffin Bell has pointed to the Antitrust Division's abandonment of its effort to block a foreign merger by court action, although the merger was within the subject matter jurisdiction of the courts, and Associate Attorney General Egan has stated that the Justice Department will "notify any foreign government at any time that an Antitrust Division official wishes to conduct investigative interviews or other official business within its territory."[26] But it is obvious that the Justice Department has a different concept of international comity than is held by the aggrieved defendants and governments in the *Uranium Cartel* litigation. For the Justice Department, international comity is a two-way street involving concessions to foreign interests but not the abandonment of significant U.S. antitrust enforcement objectives or of international cooperation in achieving such objectives. For foreign defendants and governments intervening in their behalf, comity is a one-way street, leading only to U.S. abstention from antitrust enforcement. Very few international antitrust proceedings are as charged with national economic imperatives as the *Uranium Cartel* case,[27] and therefore

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26. *See* Timberg, *The Justice Department Guide for International Operations: International Antitrust Enforcement in the Year 1978*, 60 JPOS 636, 646 (1978). The Associate Attorney General's statement was a consequence of an improperly heralded visit to the United Kingdom of an antitrust official in connection with the Uranium Cartel grand jury investigation, an event that shocked British diplomatic sensitivities doubtless because of its connection with the iniquitous Uranium Cartel litigation.

27. A factor not discussed by the courts in the *Uranium Cartel* case, but which doubtless fueled foreign resentment, was that the low $6.00 per pound price that triggered the formation of the Uranium Cartel and its strong governmental support was the result of "a major

there remains to be seen the extent to which, in the ordinary run of international antitrust cases, countries which share a measure of commitment to pro-competitive policies can adhere to a two-way concept of international comity.

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anti-competitive action" by the U.S. Government in embargoing the further shipment of foreign-produced uranium to the U.S., which represented 70 percent of the world market for uranium. *See Confirmation Hearings on John H. Shenefield, Nominee for Associate Attorney General: Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. 73 (1979-1980). *See also Hearings on Private Ownership of Special Nuclear Materials Before the Subcomm. on Legislation of the Joint Committee on Atomic Energy*, 88th Cong., 2d Sess. 336, 407-16 (1964).

Chapter Two

DIRECT UNITED STATES ENFORCEMENT ON THE SEAS AND ABROAD

The Reach of the Bill of Rights Beyond the *Terra Firma* of the United States

*Stephen A. Saltzburg**

In the last two decades, the notion that U.S. officials, whether state or federal, must comply with the Bill of Rights when making criminal investigations within the territorial United States has taken firm root. In contrast, however, the issue of whether — and how — the Constitution applies outside of the country has continued to cause problems for courts. Questions concerning the extraterritorial reach of the Bill of Rights arise most often when evidence obtained outside the United States is offered in a criminal prosecution in this country.

This article examines the issue in two contexts. The first is when U.S. officials search ships on the high seas and interrogate their passengers; the second is when foreign officials, either acting alone, at the request, or with the knowledge or active assistance of U.S. officials, conduct searches or interrogations in foreign countries. The article argues first that the protections of the Bill of Rights apply whenever U.S. officials are responsible for governmental conduct outside the territorial limits of the United States. Conversely, it asserts that the Constitution never limits the

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conduct of foreign officials not acting pursuant to a U.S. request for aid. Finally, it suggests an analysis for defining the degree of U.S. participation that invokes constitutional protections, and the types of protections required by the Bill of Rights.

I. The Geographic Scope of the Bill of Rights

One universally accepted[1] principle of U.S. constitutional law is that federal powers are limited to those enumerated in the U.S. Constitution.[2] The vintage of this fundamental precept suggests that it should be viewed with reverence.[3] However, the current scope of the federal commerce power,[4] the legislative authority given Congress under the fifth section of the fourteenth amendment,[5] and

1. The argument over time has been about the scope of power actually conferred, not about whether a power not granted to the federal government may be assumed by right. For example, the Jefferson-Hamilton debate over the establishment of a national bank focused on the interpretation of the grant of "necessary" powers to Congress in article I. Jefferson opted for a narrow reading, whereby "necessary" means were only those without which the grant of power would be "nugatory." Hamilton, on the other hand, argued that the grant of "necessary" powers should be read to allow Congress to pursue any lawful end. *See generally* G. Gunther, Cases and Materials on Constitutional Law 94-99 (10th ed. 1980).

2. *See generally*. The Federalist No. 36 (J. Madison); L. Tribe, American Constitutional Law 1-14 (1978). This article will not separately analyze state law enforcement practices. Many of the foreign or high-seas activities described herein would be outside the domain of state law. Even if states retain some independent power to enforce law outside the continental United States, the incorporation of most of the procedural sections of the Bill of Rights through the fourteenth amendment would produce limitations on state action that are similar to those placed on federal action.

3. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

4. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942). *But see* National League of Cities v. Usery, 426 U.S. 833 (1976).

5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

the historic construction of the "necessary and proper" clause,[6] suggest otherwise. Absent an express constitutional limitation on government power, the U.S. government often finds legal authority to support any action that, in its judgment, affects the national welfare. The most important limit on the power of the central government is the Bill of Rights, which was adopted in 1791 to assure that authority to claim certain powers would be expressly negated.[7] The Bill of Rights limits the powers of all parts of the federal government.[8] Distinctions between branches of government nonetheless are relevant in interpreting the scope of constitutional checks.

Nowhere is this more evident than in the investigation and prosecution of criminal cases. Much of the Bill of Rights is devoted to providing safeguards to protect those suspected of, or charged with, crime.[9] Some of these safeguards are directed specifically against the judiciary.[10] Although the rights created are far from self-defining, and have required considerable judicial interpretation, there is

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6. U.S. CONST. art. 1, § 8. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

7. *See generally* 2 R. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983-1167 (1971).

8. *See generally* L. TRIBE, *supra* note 2, at 20, 157, 224.

9. The fourth, fifth, and sixth amendments have particular importance in what typically are considered criminal prosecutions.

10. For example, the sixth amendment right to trial by jury recognizes the importance of avoiding biased or eccentric judges. Duncan v. Louisiana, 391 U.S. 145, 156 (1968). The sixth amendment right to speedy and public trial protects against the abuses of secret inquisitions, *see, e.g.*, In re Oliver, 333 U.S. 257, 268 (1948); and tardy adjudication, *see, e.g.*, Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967). *See also* S. SALTZBERG, AMERICAN CRIMINAL PROCEDURE 852 (1980). The confrontation and compulsory process clauses in the sixth amendment assure that defendants have the right to present and to examine evidence along with the government. *See generally* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978).

little evidence that federal courts have resisted these checks on their powers.[11]

The same cannot be said of the executive branch of the federal government. Entrusted with the tasks of investigating crime, working with the grand jury to indict, and prosecuting those charged, the Executive commonly seeks to contain application of the Bill of Rights as much as

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11. Perhaps this is because speedy and public trials are as much in the interest of the government as the defendant, Gannett Co. v. De Pasquale, 443 U.S. 368, 412-33 (1979) (Blackmun, J., dissenting); because jury trials remove tough and sometimes controversial decisions from judges who are happy to place responsibility elsewhere, *See* ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY, § 1.2(a), at 33 (Approved Draft 1968); and because examination of evidence is almost a *sine qua non* of litigation in U.S. tribunals, 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (Chadbourn rev. 1974). Also, it may be that judges, who have no role in investigating and charging those suspected of criminal activity, and who regularly instruct jurors on the importance of the presumption of innocence and of following the law in deciding a case, may be more inclined to protect defendants than executive officers, who view themselves as adversaries of criminal defendants. Judges assume a relatively passive role in U.S. courts; cases are brought to their courts, and parties present their cases to the court. Thus, the courts may view themselves as wholly responsible only for the procedures that are employed, and not for the facts that are developed in a case, or even for the results in cases that juries decide. Trial judges know that the public and the appellate courts will evaluate the fairness of their procedures. Courts may, therefore, bend over backwards to assure that the government does not oppress criminal defendants. Finally, it may be that judges, who spend so much time reflecting on the law that must be applied in all cases before them, come to think about the concept of a rule of law quite differently from executive officials, especially police and prosecutors.

The concern of U.S. courts for fair procedures and their willingness to honor constitutional rights are understandable. It is also consistent with the prevailing judicial view that courts are the final arbiters and protectors of the Constitution. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974); Cooper v. Aaron, 358 U.S. 1, 17-19 (1958). Whatever the reasons, U.S. courts have not resisted the application of the Bill of Rights to them, even if their decisions are not always as protective of defendants as some would like.

possible. Law enforcement officials perceive their principal task to be stopping crime.[12] In theory, they are bound to use procedures that are consonant with the letter and spirit of the Constitution. In practice, however, the law enforcement needs of the moment are likely to seem far more important[13] than the niceties of constitutional and criminal procedure.[14] Presumably, this reality would not surprise those who drafted the Bill of Rights. The design of the

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12. *See generally* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 39-71 (1968).

13. Even direct threats to national security have not been found sufficient to justify conduct in violation of the fourth amendment. *See* United States v. United States District Court, 407 U.S. 297 (1972) (rejecting the President's claim to have inherent power to authorize warrantless national security wiretaps); Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied,* 425 U.S. 944 (1976) (holding that warrants are required to wiretap certain domestic organizations, even if the surveillance in requested by the President to protect national security interests). The U.S. Army recently agreed to amend its regulations to require judicial warrants before wiretapping U.S. citizens living abroad. Wash. Post, Apr. 5, 1980, § A, at 10, col. 1. These examples illustrate an implicit recognition of the need for compliance with the fourth amendment even when important national security interests are at stake. A fortiori, U.S. involvement in routine criminal investigations abroad cannot be excused from fourth amendment standards. *See also* Wash. Post, Mar. 18, 1980, § A, at 8, col. 1 (article describing NASA's recently enacted regulations dealing with the exercise of police power in outer space).

14. This is not an attack on the integrity or honesty of law enforcement personnel. It is a recognition that those persons assigned to investigate and prosecute crime sometimes find it difficult to understand how they can perform that task when they simultaneously are denied some of the tools that would make their jobs easier. Such officials know that public pressure is likely to be great if crime rates rise and criminals are not caught and convicted; that little, if any, public reaction will be provoked if criminals are caught by officers who transcend the legal limits of their authority; and that the courts are likely to be blamed if the guilty are released and not convicted. Understandably, then law enforcement officers may become overzealous in their efforts to ferret out, gather evidence against, and prosecute criminal suspects.

fourth amendment, which places the judiciary between law enforcement officers and the public by requiring judicial approval before certain searches and seizures are undertaken, suggests the framers' concern about overly ambitious law enforcement.[15] The fifth amendment's due process clause, and more recently its privilege against self-incrimination,[16] provide additional checks. Under both amendments, courts review the actions of law enforcement officers and temper their excesses.

Nothing said thus far is novel. The Supreme Court frequently has made similar points.[17] Thus, although the fourth amendment might be read to allow warrantless searches and seizures as long as they are "reasonable," [18] the requirement of a warrant has become firmly rooted in fourth amendment jurisprudence.[19] Under the fifth amendment, the need to protect against government overreaching in the interrogation of suspects also is well established.[20]

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15. *See generally* S. SALTZBURG, *supra* note 10, at 56-59. The Supreme Court has noted that the fourth amendment, especially its warrant requirement, is a purposeful recognition that officers engaged in the difficult and unpleasant business of investigating crime may become too zealous in carrying out their activities. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

16. The privilege against self-incrimination was extended to all custodial interrogations in Miranda v. Arizona, 384 U.S. 436 (1966).

17. *See, e.g.*, United States v. Chadwick, 433 U.S. 1 (1976); Terry v. Ohio, 392 U.S. 1 (1968); Johnson v. United States, 333 U.S. 10 (1948).

18. *See, e.g.*, Trupiano v. United States, 334 U.S. 699 (1948); Agnello v. United States, 269 U.S. 20 (1925).

19. Mincey v. Arizona, 437 U.S. 385 (1978); Michigan v. Tyler, 436 U.S. 499 (1978); Chimel v. California, 395 U.S. 752 (1969); Katz v. United States, 389 U.S. 347 (1967).

20. Thus, for example, suspects undergoing custodial interrogation must be advised of their constitutional rights to remain silent and to have counsel. Mincey v. Arizona, 437 U.S. 385 (1978); Miranda v. Arizona, 384 U.S. 436, 479 (1966); *Cf.* Brewer v. Williams, 430 U.S. 387 (1977) (applying a sixth amendment right-to-counsel approach to government overreaching).

What comes as a surprise is the ready acceptance by some courts of failure to comply with these constitutional requirements when the questionable governmental conduct occurs outside the United States.[21]

The government of the United States has only the powers entrusted to it by the Constitution. Whenever and wherever it acts it relies on the Constitution as the source of its powers. Whenever it acts, it must, therefore, accept the limits on its power imposed by the same Constitution that provides the affirmative grant of power.[22] Thus, the Bill of Rights controls the activities of U.S. law enforcement officers wherever they occur. Conversely, the U.S. Constitution cannot limit the conduct of foreign officials acting abroad, regardless of whether the investigation is of a U.S. citizen or whether the fruits of the investigation ultimately are introduced in a U.S. court.

Judicial consideration of these issues has been erratic. Courts have been too quick to permit law enforcement activities by U.S. officials outside the United States to occur free of the usual constitutional restraints.[23] Judges have been particularly tolerant of excessive executive action in cases involving searches on the high seas, which are dis-

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21. *See* notes 105-38 *infra* & accompanying text.

22. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1852); Stonehill v. United States, 405 F.2d 738, 751 (9th Cir.) (Browning, J., dissenting), *cert. denied,* 395 U.S. 960 (1969).

The importance of the Bill of Rights outside the territory of the United States is highlighted in Judge Stern's opinion in United States v. Tiede, 86 F.R.D. 227, 244 (U.S. Ct. for Berlin, 1979) ("[E]verything American public officials do is governed by, measured against, and must be authorized by the United States Constitution."). Because Judge Stern runs through the early Supreme Court decisions that might cast doubt on the proposition urged here, I do not repeat his analysis. I would follow it. *See also* Rosado v. Civiletti, 621 F.2d 1179, 1189 (2d Cir. 1980).

23. *See, e.g.,* United States v. Warren, 578 U.S. 1058 (1978). *See* notes 36-51 *infra* & accompanying text.

cussed in section II.[24] Judges also frequently overlook the inability of the U.S. Constitution to bind foreign governments.[25] One cause of this oversight is the tendency of many courts to focus on the suppression issue — *i.e.*, whether evidence obtained outside the United States in violation of U.S. constitutional principles should be excluded from U.S. courts — while ignoring the basic question of whether a constitutional violation has occurred.[26] Many sea-search decisions[27] ignore fourth and fifth amendment limitations on affirmative grants of federal power and unnecessarily threaten individual liberty. In sharp contrast, the decisions in cases involving evidence obtained abroad indicate a trend that threatens, unnecessarily, to tie the hands of U.S. officials who cooperate with foreign governments to solve international crime.[28]

This article proposes a two-pronged analysis for testing the constitutionality of procedures used in criminal investigations outside the territorial United States. First, courts should ask whether U.S. officials are acting in an effort to search and seize evidence, to interrogate a suspect, or to have someone conduct a search and seizure or investigation for them. If the answer is no, then our Bill of Rights has little, if any, relevance to the actions taken either by U.S. officials or officials of foreign governments. If the answer is yes, then the limits of the fourth and fifth amendments should be fully applicable to govern the conduct of U.S. officials.[29] Only then would the second question be asked:

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24. *See* text at notes 36-104 *infra*.

25. *See, e.g.*, United States v. Marzano, 537 F.2d 257 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). *See* text at notes 133-37 *infra*.

26. *See, e.g.*, United States v. Mundt, 508 F.2d 904 (10th Cir. 1974). *See* text at notes 112-20 *infra*.

27. *See* text at notes 33-97 *infra*.

28. *See, e.g.*, United States v. Jordan, 24 C.M.A. 156, 51 C.M.R. 375 (1976). *See* text at notes 121-32 *infra*.

29. These constitutional provisions also may restrain the conduct of foreign officials in the limited number of situations where those officials are aiding a search or interrogation at U.S. request. One of the partici-

What does the relevant constitutional provision require of officials under the circumstances? [30]

This two-pronged approach offers the additional advantage of consistency with the general principles of international law. For example, it precludes arbitrary searches and seizures by U.S. officials on the high seas, which are similarly proscribed under international law.[31] It also is consistent with internationally recognized principles of territorial sovereignty and jurisdiction.[32] Although encouraging international cooperation in law enforcement,

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pants in the Sokol Colloquium suggested that none of the Bill of Rights protections should be extended to aliens (at least not to those without some permanent affiliation with this country) when they are within the territory of another nation. Stephan, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT'L L. 777 (1980). Essentially, the argument is that the drafters of the first constitutional amendments did not intend their protections to be conferred upon these aliens, such protections interfere with the executive's foreign relations power, and courts cannot effectively supervise actions with respect to aliens abroad.

Although there is no way to prove the framers' intent, it is odd to conclude that they wanted U.S. power to be exerted in foreign nations, if possible, without enforcing the constitutional limitations upon that power. It also is odd that a power implied from the structure and from some vague language of the Constitution (the foreign relations power) would be given more deference than explicit powers conferred elsewhere in the instrument.

30. This article does not address the proper scope of these constitutional limitations per se. Rather, it simply asserts that the extraterritorial reach of these provisions is coextensive with the protections they guarantee within U.S. territory. *Accord*, United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. for Berlin, 1979). Thus, the fourth and fifth amendments curb the search, seizure, and interrogation powers of U.S. officials abroad, even where the object of that protection is not a U.S. citizen. *Contra*, Stephan, *supra* note 29, at 780-83 (asserting that the Bill of Rights does not protect aliens abroad from U.S. power).

31. *See, e.g.*, Convention on the High Seas *done* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (*entered into force* Sept. 30, 1962).

32. *See generally* J. BRIERLY, THE LAW OF NATIONS chs. V & VI (6th ed. 1963).

it ensures that assertions of U.S. investigatory power will be contained within applicable U.S. constitutional limits.

II. Searches and Interrogations on the Seas

Oceans near the United States are divided into various zones under domestic statutes and international law.[33] For purposes of this article, the differences among the territorial sea (from the coast out to three nautical miles), the contiguous zone (from three to twelve miles from the coast), and the high seas (beyond twelve miles)[34] will be less important here than in other contexts.[35]

A. Searches and Seizures

United States v. Warren,[36] an *en banc* decision of the

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33. *See, e.g.*, 19 U.S.C. §§ 1401(j), 1701, 1703-1711 (1976); Convention on the Territorial Sea and Contiguous Zone, *done* Apr. 29, 1958, art. 24, 15. U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (*entered into force* Sept. 10, 1964); Draft Convention on the Law of the Sea (Informal Text), art. 3, U.N. Doc. A CONF.62 WP.10 Rev. 3 (1980) [hereinafter cited as Draft Convention]. *See also* Informal Composite Negotiating Text/Rev. 1, U.N. Doc. A/CONF.62 WP.10 Rev 1 (1979), *reprinted in* 18 Int'l. Legal Materials 686, 703 (1979).

34. For discussion of the relevance of these divisions, see Carmichael, *At Sea with the Fourth Amendment*, 32 U. Miami L. Rev. 51, 55-56 (1977); Note, *High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 Harv. L. Rev. 725, 731-38 (1980).

35. The Convention on the High Seas, *done* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, *entered into force* Sept. 30, 1962, and the question whether it is self-executing, are outside the scope of this article. *See* United States v. Postal, 589 F.2d 862 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979).

The categorization of certain areas as "custom waters," *see* note 47 *infra*, is similarly irrelevant to the present analysis. The relevance of the designation "custom waters," if any, is to the proper scope of constitutional protection, not treated here, by analogy to border search cases. *See* text at notes 69-71 *infra*.

36. 578 F.2d 1058 (5th Cir. 1978) (*en banc*). More recently, the Fifth Circuit decided *en banc* that the fourth amendment does little to control the activities of enforcement officers acting on the seas. United States v.

Fifth Circuit, is a useful analytical starting point. In August 1974, three men set sail from Florida, heading for Colombia in a shrimping vessel named *Stormy Seas.* A Coast Guard cutter stopped the boat approximately 700 miles from the United States between Haiti and Cuba in the Westward Passage. Although the Coast Guard had no reason to suspect anyone on board of wrongdoing, had not witnessed anything suspicious prior to stopping the *Stormy Seas,* and did not know that the destination was Colombia, it decided to board the vessel. Three Coast Guard officers, a Drug Enforcement Agency (DEA) officer, and a Customs Service official made up the boarding party.[37]

Initially, one of the Coast Guard officers asked to see the ship's enrollment papers, which were produced. The DEA agent asked about firearms, which were on board legally. This agent also asked questions about the purpose of the

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Williams, 617 F.2d 1063 (5th Cir. 1980) (*en banc*). Much of the majority opinion is dictum, since the court found reasonable grounds for enforcement officers to suspect that a foreign vessel was violating U.S. drug laws. *Id.* at 1084. This suspicion justified a stop, and the finding of drugs may have justified everything else. But the court apparently wanted to provide guidance for future cases and suggested that little, if any, cause was required to stop a ship on the high seas, and even less for a stop in customs waters. *Id.* at 1087-88. Although the court recognized that certain areas of the ship might be more private than others, it suggested that the private areas could be searched upon a showing of reasonable suspicion and without a warrant. *Id.* at 1087. Six concurring judges would have held that the fourth amendment does not restrict government action as to a foreign vessel on the high seas. *Id.* at 1091. Four concurring judges would have held that the fourth amendment law regarding automobiles and planes also ought to be applied to boats. *Id.* at 1095. *See also* United States v. Alfrey, 620 F.2d 551 (5th Cir. 1980); United States v. Ricardo, 619 F.2d 1124 (5th Cir. 1980).

The Fourth Circuit recently relied on the Fifth Circuit's *Warren* decision to find that government authority is "plenary" on the high seas. United States v. Harper, 617 F.2d 35, 38 (4th Cir. 1980). The First Circuit also has found the position of the Fifth Circuit to be persuasive. *See, e.g.,* United States v. Hilton, 619 F.2d 127, 131 (1st Cir. 1980).

37. 578 F.2d at 1061.

voyage, while the Customs Service officer and a Coast Guard officer made a "cursory search" of the vessel.[38] A small amount of marijuana was found.[39] Interrogation about the purpose of the trip continued, and eventually someone on board admitted possessing money that had not been declared prior to leaving the United States. When he took the officials to see the money, they observed other envelopes in plain view. Subsequently, arrests were made, additional cash was found, and other evidence was located which indicated that the passengers intended to purchase drugs in Colombia.[40]

Because the boarding party had no specific reason for stopping the *Stormy Seas*, nor any reason to believe that anyone on board had done anything illegal before the stop was made, it might seem obvious that the stop, search, and interrogation all were violations of fourth and fifth amendment rights. Indeed, the Fifth Circuit panel that first heard the case so found.[41] The court of appeals, sitting *en banc*, relied on the act defining the jurisdiction of the Coast Guard [42] to reach a different result. The act authorizes the Coast Guard to

> make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries

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38. *Id.* at 1062.

39. Mere possession of a controlled substance beyond the territorial limits of the United States (3 miles from the coast) is not illegal. *Id.* at 1062 n.2.

40. *Id.* at 1062.

41. 550 F.2d 219 (5th Cir.), *cert. denied*, 434 U.S. 1016 (1978).

42. 14 U.S.C. § 89(a) (1976).

> to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.[43]

A majority of the court reasoned that the statute authorized the procedures employed by the boarding party and was an expression of the lawful authority of the federal government: "This law is constitutional . . . and pursuant to its authority, the Coast Guard may apprehend and board any vessel of the American flag. This authority is plenary when exercised beyond the twelve-mile limit; it need not be founded on any particularized suspicion." [44] In a footnote, the court suggested that if the search had been closer to the United States, within the territorial or contiguous zones, additional search powers might have been asserted.[45] The court cited the Tariff Act of 1930 [46] which provides that "[a]ny officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or . . . within a customs-enforcement area . . . ." [47]

If the *Stormy Seas* had been a car on a U.S. road rather than a ship on the high seas, it could not validly have been stopped at the whim of a well-intentioned federal officer concerned about drugs or illegal aliens being smuggled into

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43. *Id.*

44. 578 F.2d at 1064-65.

45. *Id.* at 1064-65 n.4.

46. 19 U.S.C. § 1581(a) (1976).

47. *Id.* "Customs waters" include the waters up to twelve nautical miles from the coast, 19 U.S.C. § 1401(j) (1976), and customs-enforcement areas beyond this can be designated by the President. *Id.* § 1701(a). International law presently recognizes a State's right to declare a contiguous zone up to 12 miles from the coast for the enforcement of customs laws. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 33, art. 24. There appears to be some international support for extending customs waters out to 24 miles. Draft Convention, *supra* note 33, art. 33.

the country.[48] Yet, not a single judge on the *en banc* court was willing to say that an arbitrary stop [49] on the ocean itself violated the fourth amendment. Judge Roney's dissenting opinion argued that the Coast Guard validly may conduct safety and documentation inspections, but lacks power to go beyond such inspections. He found that the customs officer and the DEA agent in *Warren* exceeded the scope of the Coast Guard's lawful power.[50] Judge Fay, whose dissent emphasized constitutional principles, nevertheless agreed that the Coast Guard may stop a U.S. vessel on the high seas for a safety or documents inspection without any showing of cause.[51]

Although no one on the court believed that the fourth amendment was totally inapplicable, neither the majority nor the dissenters focused on it. Both apparently thought that Congress could authorize stops and searches on the high seas that could not be authorized on land. Could Congress authorize a safety inspection of all automobiles traveling in interstate roads if such an inspection would result in examining almost all parts of the vehicle? There is reason to doubt it.[52] Could Congress authorize a safety

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48. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266 (1973). *See also* text at notes 54-59 *infra*.

49. An "arbitrary stop" would be one not based on articulable facts or done pursuant to a systematic pattern of activity designed to reduce the possibility of singling out an individual for special treatment.

50. 578 F.2d at 1078 (Roney, J., dissenting).

51. *Id.* at 1079 (Fay, J., dissenting).

52. *See* Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976). *Cf.* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (rule that warrantless searches and seizures are generally unconstitutional applies to business premises as well as homes and automobiles). These cases emphasize the Court's concern with unfettered discretion in law enforcement. In *Prouse*, random license checks on a highway were held to violate the fourth amendment. *Martinez-Fuerte* suggests that stationary checkpoints might be a lawful way to check licenses, but even there the Court indicated that an important factor in the analysis was the intrusiveness of the stop. In that case, the stop was legal because "[n]either the vehicle nor its occupants [were] searched,

inspection of all houses with materials that have moved in interstate commerce and provide no standards for agents to use in conducting the inspection? There is even more reason to doubt this.[53] Although Congress may have strong and legitimate reasons for wanting to authorize broad search powers, such reasons cannot thereby justify the circumvention of fourth amendment restraints.

The Supreme Court has recognized the constitutionally required limits on congressional power in the case of border searches. Congress has given immigration officials a broad statutory mandate to deal with the problem of illegal aliens.[54] Immigration officials attempted to carry out this mandate by promulgating and enforcing regulations that allowed arbitrary, standardless stops of cars within one hundred miles of the border.[55] In *Almeida-Sanchez v.*

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and visual inspection of the vehicle [was] limited to what [could] be seen without a search." 428 U.S. at 558. *See also* Carroll v. United States, 267 U.S. 132 (1924) ("It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." 267 U.S. at 153-54).

53. *See* Camara v. Municipal Court, 387 U.S. 523 (1967). *See also* Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

54. 8 U.S.C. § 1357(a) (1976) provides in pertinent part:

> (a) Any officer or employee of the [INS] authorized under regulations proscribed by the Attorney General shall have power without warrant —
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> . . . .
>
> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any . . . aircraft . . . or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border . . . .

55. 8 C.F.R. § 287.1(a)(2) (1980) defines "reasonable distance" as "within 100 air miles from any external boundary of the United States . . . ."

United States,[56] the Supreme Court found that this assertion of broad search powers violated the fourth amendment because it failed to incorporate the standard of cause that is constitutionally required before the government intrudes upon its citizens. The Court did not doubt that aliens and drugs could be smuggled into the country by car or with the aid of cars placed at strategic points on the U.S. side of the border.[57] Drug smuggling and transportation of illegal aliens [58] are very real problems for law enforcement officers both on land and at sea.[59] Nonetheless, the legitimate governmental reasons which failed to justify standardless searches near territorial borders are no more compelling on the high seas.

Recent Supreme Court cases have confirmed that the driver of an automobile cannot be stopped for a license and registration check, unless at least a reasonable suspicion of wrongdoing exists, or the check procedure ensures that no one is singled out for special treatment.[60] In sharp contrast

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56. 413 U.S. 266 (1973). *See generally* Note, *Area Search Warrants in Border Zones:* Almeida-Sanchez *and* Camara, 84 YALE L.J. 355 (1974).

57. 413 U.S. at 276 (Powell, J., concurring). The court did not find that the apprehension in one year of 195 illegal aliens on the road where the search in question had occurred was significant. *Id.* at 273 n.5.

58. Justice White's dissent in *Almeida-Sanchez* notes the magnitude of the problem:

> In fiscal year 1972, 398,000 aliens who had entered the United States without inspection were located by Immigration and Naturalization officers; and of the 39,243 deportable aliens located through traffic checking operations, about one-third, 11,586, had been assisted by smugglers. . . . Ninety-nine percent of all aliens illegally entering the United States by land crossed our border with Mexico.

413 U.S. at 294 n.6.

59. *See Coast Guard Drug Interdiction: Hearings on H.R. 10371 and H.R. 10698 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 119 (1978).

60. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648 (1979). *See* note 52 *supra*.

to these decisions are cases like *Warren*, which relax rules for searches on the seas with no apparent rationale.

Because the Constitution grants the authority for the federal government's search action wherever it occurs, the fourth amendment should be read to limit that authority whether on land or on sea. There is virtually nothing in the Constitution to suggest that the Bill of Rights is not coextensive with the grants of federal power.[61] Those framers who sought to control the power of the federal government presumably would have wanted to control it whenever the actions of the government threatened the basic values underlying the Bill of Rights. The values of privacy and personal security should be as important on a ship as they are in a car, in a house, or on land. Yet the court of appeals in *Warren* paid little attention to this analysis. Apparently, it took the view that the Constitution does not act to protect personal rights to the same extent that it operates to confer federal power. There is room in interpreting the fourth amendment to consider the legitimate interests of government officials in promoting safety, in registering ships that fly the U.S. flag, and in scrutinizing what people bring into this country from abroad. Recognition of legitimate government interests, however, means only that the fourth amendment does not always require warrants or probable cause before government officials can act. It does not mean that the government can disregard the fourth amendment on the ground that compliance with its requirements makes it difficult to enforce the criminal law. There is no doubt that the burdens of complying with the amendment do make it more difficult for the government to enforce criminal sanctions and to gather evidence against suspected wrongdoers. But that which makes it difficult for the government to gather evidence is that

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61. The Constitution exempts military personnel from certain of the provisions. *See, e.g.*, U.S. CONST. amend. V (grand jury indictment requirement does not apply). This article does not consider the scope of the constitutional rights of military personnel.

which provides some sense of security to people otherwise within the reach of government officials.

Assuming, as is urged here, that the Coast Guard in *Warren* was not exempt from the fourth amendment because of the exigencies of law enforcement, what standards should be used to evaluate its conduct? Under the approach suggested in the introduction, the first question is whether the government of the United States is acting to conduct a search. This plainly receives an affirmative answer in *Warren*. The second question — what does the fourth amendment require under the particular circumstances? — in turn requires a three-step analysis. The analysis begins with a presumption that warrantless searches are unconstitutional.[62] The next step is to ask whether a warrantless search should be sustained under special circumstances if probable cause exists to support the search.[63] Of course, in *Warren* there was no probable cause. A usual third step is to inquire whether, in the absence of a warrant and probable cause, the limited nature of an intrusion and special circumstances surrounding it justify some action based on a lesser standard.[64] None of the special situations that have been developed to govern land searches[65] were relied upon in the *Warren* opinion, but at least three deserve attention here: border searches,[66] the so-called automobile exception,[67] and administrative searches.[68]

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62. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385 (1978); Michigan v. Tyler, 436 U.S. 499 (1978); Coolidge v. New Hampshire, 403 U.S. 443 (1970); Katz v. United States, 389 U.S. 347, 357 (1967).

63. *See, e.g.*, United States v. Watson, 423 U.S. 411 (1975); Chambers v. Maroney, 399 U.S. 42 (1970).

64. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968).

65. Other special situations include search incident to a lawful arrest, consent searches, the "plain view" doctrine, and cases of "hot pursuit." *See generally* C. WHITEBREAD, CRIMINAL PROCEDURE 133-235 (1980).

66. *See* notes 69-71 *infra* & accompanying text.

67. *See* notes 72-76 *infra* & accompanying text.

68. *See* notes 77-82 *infra* & accompanying text.

If the argument made here — that fourth amendment protections remain fully applicable to searches on ocean waters — had been made to the majority in *Warren*, it is possible that the judges would have sought to rely on the border search exception to the warrant requirement.[69] A border search requires neither a warrant nor probable cause as long as it takes place at the border or its "functional equivalent."[70] In *Warren*, however, there was no showing that the search was conducted in a place that reasonably could be said to be a border or the "functional equivalent" of a border. Nor did it appear that the *Stormy Seas* was attempting to reenter the United States with its cargo, or that it ever had had contact with a foreign nation.[71]

If the border search analogy fails, a judge might explore the automobile exception, which permits a warrantless search if both probable cause and circumstances necessitating prompt action exist.[72] *United States v.*

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69. *See generally* United States v. Ramsey, 431 U.S. 606 (1977); Carroll v. United States, 267 U.S. 132 (1924) (dictum); Note, Almeida-Sanchez *and Its Progeny: The Developing Border Zone Search Law*, 17 ARIZ. L. REV. 214 (1975). *See also* Note, *supra* note 34, at 731-38.

70. *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973).

71. *See generally* United States v. Zurosky, 614 F.2d 779, 788 (1st Cir. 1979); United States v. Acosta, 489 F. Supp. 61 (S.D. Fla. 1980); Note, *supra* note 34, at 736. *See also* Torres v. Puerto Rico, 442 U.S. 465 (1979) (the border search exception did not apply when a boat was searched on a trip between the mainland and Puerto Rico because the boat did not cross an international border). *Torres* suggests that difficulty in enforcing the law does not justify overextending the border search argument.

72. *See generally* Moylan, *The Automobile Exception: What It Is and What It Is Not — A Rationale in Search of a Clearer Label*, 27 MERCER L. REV. 987 (1975). A judge also might explore the "reasonable suspicion" automobile-stop cases, which permit a stop, but not a full search, on a lesser showing of cause. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

Cadena[73] and *United States v. Rubies*[74] are authorities for the proposition that this exception applies on sea as well as on land. In both cases the government had done its investigation before boarding the ships. Probable cause to suspect narcotics violations existed to justify a search in the former case, which, when coupled with the ship's inherent mobility, prompted the *Cadena* panel to excuse the boarding.[75] Reasonable grounds for a certificate and identification check existed in the latter case, where the vessel was running at night without displaying a flag or lights.[76] The automobile exception clearly is inapplicable in *Warren*, however, since the Coast Guard had neither probable cause nor reasonable suspicion for the initial stop and boarding of the *Stormy Seas*.

The administrative search cases provide a third possible basis for analysis.[77] These cases might suggest that warrants should be required whenever anyone does not voluntarily permit Coast Guard officials to undertake a search.[78] The cases holding that warrants generally are required are distinguishable, however, on the ground that magistrates usually are not available on the high seas.[79]

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73. 585 F.2d 1252 (5th Cir. 1978), *clarified per curiam*, 588 F.2d 100 (5th Cir. 1979).

74. 612 F.2d 397 (9th Cir. 1979).

75. 585 F.2d at 1263, *clarified per curiam*, 588 F.2d at 101-02.

76. 612 F.2d at 404.

77. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967); Rothstein & Rothstein, *Administrative Searches and Seizures: What Happened to* Camara *and* See?, 50 WASH. L. REV. 341 (1975).

78. *See, e.g.*, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

79. It could be argued persuasively that part of an inspection scheme should include a magistrate on a ship responsible for conducting administrative searches. On the other hand, such a procedure might run afoul of the holding in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979), with respect to the neutrality of the magistrate issuing the warrants. To avoid the problem of the magistrate improperly participating in a search, the magistrate should rule in advance on its permissible scope. In many instances, it would not be feasible to have a magistrate on board. An

Still, it would be possible to obtain "area warrants" [80] or the equivalent of such warrants, which could be required before any administrative inspections are attempted.[81] At a bare minimum, announced standards for inspections could be required to eliminate arbitrary rulemaking.[82]

Focusing on the high-seas locus of the search, the *Warren* majority did not rely on any of these approaches to justify the search and seizure activities undertaken by the boarding party, even though it is now clear that the fourth amendment protects against the unfettered exercise of executive discretion [83] exhibited in *Warren*. This loose analysis is especially troublesome in view of the presence of the narcotics agent and customs officer. These officials were present not to assist in safety inspections, but rather to enforce U.S. drug and smuggling laws.[84] Indeed, narcotics officers in the United States admit that they use high-seas searches to track down drugs.[85] The need for protection

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alternative might be to have a magistrate available to rule on warrant applications made by radio transmission from the seas.

80. Such warrants permit inspectors to conduct reasonable searches within an area as a whole rather than limiting the search to a particular site. The use of "area warrants" by San Francisco city housing officials was upheld by the Supreme Court in Camara v. Municipal Court, 387 U.S. 523, 534-39 (1967).

81. *See* United States v. Almeida-Sanchez, 413 U.S. 266, 283-85 (1973) (Powell, J., concurring).

82. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 330-31 (1978) (Stevens, J., dissenting).

83. *Id.* at 312-13.

84. *See Drug Smuggling (San Juan, P.R.): Hearings Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 1st Sess. 13, 23-24 (1975).

85. By the placement of a Customs Patrol Officer on board a Coast Guard vessel,

> thus utilizing the Coast Guard authority to hail American vessels . . . for the purpose of performing safety and documentation checks . . . the first wave of the attack is

against extensive pretext searches is plain. Courts must ensure that legitimate safety inspections are conducted without opening the door to wholesale drug and customs searches. For purposes of this article, it is more important to recognize that the fourth amendment should protect people on boats than to establish exactly what forms of limited searches might be approved short of probable cause.[86]

Recently, the Ninth Circuit in *United States v. Piner*[87] offered an analysis similar in part to that urged in this article. The *Piner* court faced a suppression question involving marijuana found during the routine safety inspection of a pleasure boat in San Francisco Bay. No suspicious circumstances had prompted the Coast Guard's boarding. Although apparently willing to permit random

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> launched. . . . The Coast Guard authorities provide the entrée and the Customs officer provides the expertise and experience in concealment techniques, drug identification and interdiction.

Id. at 13.

86. One commentator has suggested several administrative schemes that might pass constitutional muster, *e.g.*, a mandatory dockside inspection program similar to the automobile inspection programs; administrative warrants permitting safety inspections of randomly selected ships within a given period of time, warrants allowing inspection of any ship whose registration number ends with a specified two-digit number if it is sighted within a given period. *See* Note, *supra* note 34, at 743-49.

Warrantless searches may, in fact, be more necessary on the high seas than on a highway. Justice Harlan, in his concurring and dissenting opinion in Chambers v. Maroney, 399 U.S. 42, 63-64 (1970), distinguishing between the search and the seizure of a vehicle, argued that a car merely should be secured while a warrant is obtained for a search. Particularly when the occupants have been arrested and the car has been towed to the police station, there is no danger that evidence will be destroyed, and thus no need for an immediate warrantless search. However, when a boat is stopped on the high seas, an immediate search often will be necessary to insure that there is no one hiding on board who will be able to destroy evidence.

87. 608 F.2d 358 (9th Cir. 1979).

daylight inspections,[88] a majority of the court analogized the facts to automobile-stop cases and found that a random stop at night was an unwarranted intrusion. Even this limited application of fourth amendment protections provoked a strong dissent. The dissent argued that no showing of cause or other regulation of discretion was required to justify the Coast Guard action under relevant statutes.[89]

Although the majority did recognize the importance of making the fourth amendment meaningful on the sea, its reasoning leaves much to be desired. It found random daylight safety inspections of pleasure craft permissible because governmental safety regulations apply only when such boats are in use, thereby precluding the possibility of scheduled inspections at dockside with warrants.[90] The government's own regulations should not be permitted to provide the excuse for random maritime intrusions without a showing of cause, at least not where less intrusive means are available. Simply by modifying its regulations, the government could compel pleasure boat owners to submit their boats for periodic inspections and require that safety devices not be removed between inspections.[91]

The dissent was not concerned about uncontrolled and unregulated executive action. It found authority for random stops of vessels on the sea [92] in *Warren* and in the history of the Coast Guard jurisdiction statutes.[93] Such reasoning

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88. *Id.* at 361.

89. *Id.* at 364 (Kennedy, J., dissenting).

90. *Id.* at 359-60.

91. Other less arbitrary approaches also are available, such as the requiring of area warrants by analogy to the administrative search cases, and use of "water-block" stops of all ships returning to dock, by analogy to automobile checkpoints, apparently permissible under Delaware v. Prouse, 440 U.S. 648, 656 (1979).

92. 608 F.2d 358, 363-64 (Kennedy, J., dissenting).

93. *See* notes 42-43 *supra* & accompanying text.

is questionable. Rather than suggesting that all searches on the high seas should be considered inherently different from other searches, the history indicates that certain searches should be treated as border searches.[94] Under the facts of *Piner*, where the search occurred within U.S. territorial waters, the border-search analogy is weak. Additionally, the fact that the fourth amendment was adopted a year after the first statute cited by the dissent might suggest that the fear of federal power that resulted in speedy ratification of the Bill of Rights was based in part on statutes like the one authorizing searches by revenue officers. Moreover, after the fourth amendment was passed, Congress may have assumed that the statute would be carried out in compliance with the new amendment. Although it has taken some time for federal courts to develop the contours of the fourth amendment, it is now clear that probable cause, warrants, and other protections against unfettered executive discretion are required. The Coast Guard jurisdiction acts [95] and similar statutes should be read in light of the present body of fourth amendment jurisprudence.

In the *Rubies* case,[96] a different panel of the Ninth Circuit refused to decide whether the fourth amendment puts any constraints on Coast Guard inspections, suggesting that the limited decision in *Piner* may not be the last word by that

94. Section 31 of the Revenue Cutter Service Act, enacted by Congress in 1790, authorized the search of vessels "in any part of the United States, or within four leagues of the coast thereof, if bound to the United States . . . ." 1 Stat. 164 (1790). In 1866, an anti-smuggling bill was enacted, authorizing the stopping and search of "any vessel," but limiting searches of persons or goods on board to those cases where there was "reasonable cause to suspect a violation of the customs laws." 14 Stat. 178 (1866). The focus of these statutes — customs violations — suggests that they were primarily directed at vessels that had crossed international borders.

95. 14 U.S.C. § 89(a) (1976). *See* text at notes 42 & 43 *supra*.

96. 612 F.2d 397 (9th Cir. 1979). *See* text at notes 74 & 76 *supra*.

court.[97] Because Judge Kennedy, the *Piner* dissenter, was also a member of the *Rubies* panel, the decision is not surprising. *Rubies* also skirted the question whether the fourth amendment applies to searches of a ship which flies no flag and makes false claims regarding its country of registration and its port of destination. This is an issue which should be resolved easily once the applicability of the fourth amendment on the high seas is accepted. If the government claims the power to make stops, searches, and seizures, then the fourth amendment should control the kinds of stops, searches, and seizures that are made. The amendment extends where federal power extends. Properly applied, it restricts that power on the oceans as well as on land.

B. Self-Incrimination

Oddly enough, the same courts which have had such difficulty seeing that the fourth amendment should be applied on the seas have assumed that fifth amendment rights would be fully applicable in such circumstances.[98] Both *Rubies* and *Warren*, for example, assume that *Miranda*[99] applies to custodial interrogations on water as well as on

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97. 612 F.2d at 404.

98. The exclusionary rule, which remedies violations of fourth amendment rights by suppressing evidence obtained in an illegal fashion, recently has come under sharp attack by members of the Court. *See, e.g.*, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 411-27 (Burger, C.J., dissenting). The decline in favor of this *remedy* does not necessarily suggest, however, that the Court views fourth amendment *rights* as any less important than fifth amendment rights. It thus does not explain the divergent approaches to the two amendments by the *Rubies* and *Warren* courts.

99. Miranda v. Arizona, 384 U.S. 436 (1966). *Miranda* requires U.S. law enforcement officers conducting custodial interrogations to warn a suspect prior to any questioning that he has the right to remain silent, the right to request and have counsel present, and that anything he says can be used against him in court. *Id.* at 444, 479.

land.[100] However, the application of the privilege against self-incrimination on the seas may be somewhat different from its application elsewhere. The majority opinion in *Warren* provides a good example. Although the *Stormy Seas* was forced to stop, was boarded by an armed party, was subjected to the seizure of its weapons, and had its passengers held on the fantail of the ship, the majority concluded that "[e]very American flag vessel on the high seas is subject to Coast Guard boarding and inspection. . . . Therefore the coercive atmosphere that is the primal indicium of a custodial interrogation . . . is generally absent because such boardings are routine." [101]

This analysis poses several problems. First, under a proper view of the fourth amendment, ships could not be stopped without cause. Second, the legality or routine nature of the stop does not necessarily deprive it of its coerciveness.[102] Deprivation of freedom is not reduced because officers have lawful reasons for making stops. There is no reason to believe that people view random stops of vessels as routine. Persons on ships are much less likely to be familiar with Coast Guard stops, and hence consider them routine, than people on land are with vehicle [103] or

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100. 612 F.2d at 404; 578 F.2d 1058, 1070-72 (5th Cir. 1978) *(en banc)*. Both courts determined that the *Miranda* requirements had been met.

101. 578 F.2d at 1070.

102. The Court has noted that the routine nature of a stop bears on the degree of intrusiveness, and hence on infringement of privacy interests protected by the fourth amendment. A lesser showing of cause may be needed to justify a routine stop. *See* United States v. Mendenhall, 100 S. Ct. 1870 (1980). Its routine nature does not make it any less coercive, however.

103. In Delaware v. Prouse, 440 U.S. 648, 657 (1979), the Court indicated its concern about

> the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents. . . . [T]hese stops generally entail law enforcement officers signalling a moving automobile to pull over to the side of the roadway, by means of a possibly

airport stops.[104] *Warren* looks like a case that honors *Miranda*. Instead, it actually may weaken the protection of *Miranda* during maritime interrogations.

The fourth and fifth amendments should not lose force because they are applied outside U.S. territory. Whether a search or interrogation takes place on land or sea is not important. What is important is why the search or interrogation was commenced, what standards justify the investigative procedure, and what protections extend to a target of an investigation. The cases described in this section involve U.S. officials taking action pursuant to their powers under the Constitution. Whether they like it or not, officials who claim federal power are bound by the most important constitutional restrictions which control its exercise.

III. Searches and Interrogations Abroad

This section first examines two foreign search situations that should be easy for courts to resolve: searches resulting from information provided by U.S. officials, and those in which U.S. officials participate directly. The remainder of the section turns to harder cases and issues, and suggests a test for judging U.S. conduct that should assist courts to protect the values traditionally associated with the fourth and fifth amendments without unduly limiting U.S. cooperation with foreign governments.

A. Searches Which Result from Tips to Foreign Governments by U.S. Officials

Brulay v. United States [105] is the type of case in which the fourth amendment should present little difficulty for gov-

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unsettling show of authority. [They] interfere with freedom of movement, are inconvenient, and consume time.

104. United States v. Ivey, 546 F.2d 139 (5th Cir.), *cert. denied*, 431 U.S. 943 (1977); United States v. Brennan, 538 F.2d 711 (5th Cir.), *cert. denied*, 429 U.S. 1092 (1977).

105. 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967).

ernment agents or courts. Mexican police suspected Brulay of narcotics trafficking because his vehicle appeared to be overloaded. They stopped him, searched his car, and found large quantities of narcotics. Although U.S. customs agents had warned Mexican police that Brulay might be bringing narcotics into the country, there was no evidence that the Mexicans would not have acted on their own suspicion and searched the car anyway.[106] When the narcotics evidence subsequently was offered in a prosecution in the United States, the Ninth Circuit upheld the district court's determination that the fourth amendment had not been violated by the Mexican search, and therefore, that the evidence should not be suppressed.[107]

Although some commentators have expressed doubts about this decision,[108] it is plainly correct. The fourth amendment does not provide a standard of procedure for Mexican law enforcement officers.[109] They are bound only by Mexican law. That U.S. officials properly warned Mexico of a possible violation of Mexican law should not matter. Mexico, which had a valid interest in protecting itself against narcotics violations, made the decision to search Brulay. Nothing in the fourth amendment prevents U.S.

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106. *Id.* at 348.

107. *Id.*

108. Note, *The Applicability of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained in Foreign Countries*, 16 COLUM. J. TRANSNAT'L L. 495, 505-08 (1977) [hereinafter cited as *The Applicability of the Exclusionary Rule*]; Note, *The New International "Silver Platter" Doctrine: Admissibility in Federal Courts of Evidence Illegally Obtained by Foreign Officers in a Foreign Country*, 2 J. INT'L L. & POL. 280, 294-96 (1969) [hereinafter cited as *The New International "Silver Platter" Doctrine*]; Note *The Fourth Amendment Abroad: Civilian and Military Perspective*, 17 VA. J. INT'L L. 515, 520-23 (1977).

109. *See* Rosado v. Civiletti, 621 F.2d 1179, 1189 (2d Cir. 1980) ("[T]he Bill of Rights . . . does not and cannot protect our citizens from the acts of a foreign sovereign committed within its territory.").

law enforcement officers from warning other countries about possible violations of their own laws. It is true that Mexican officials searched without a warrant, and possibly without probable cause. But warrants and probable cause are requirements of U.S. law designed to apply only to U.S. law enforcement officials. A U.S. court that admits evidence seized in a warrantless search conducted by foreign officials without probable cause does not threaten the integrity of the fourth amendment.[110] Once this is recognized, the wisdom of the decision is evident.[111]

B. Direct U.S. Participation in Foreign Law Enforcement Activities

United States v. Mundt [112] is a very different case on its facts from *Brulay*. During a U.S. prosecution for narcotics violations, evidence obtained in a Peruvian search, seizure, and interrogation was offered against Mundt. A U.S. agent had participated in the planning of the search and seizure, had shared responsibility for monitoring Mundt's room, and had field-tested the narcotic. Following his arrest, Mundt was interrogated in jail by a Peruvian officer, to whom he made incriminating statements. The court of appeals, like the *Brulay* court, found no violation of the fourth or fifth amendments and approved the trial judge's denial of a motion to suppress the evidence so obtained.[113]

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110. This point, more than any other, is overlooked by many commentators. *See, e.g.*, Note, *The Fourth Amendment Abroad: Civilian and Military Perspectives*, *supra* note 108, at 536-40; Note, *The New International "Silver Platter" Doctrine*, *supra* note 108, at 304-13.

111. The *Brulay* court had no occasion to decide whether a violation of fifth amendment rights required exclusion of evidence. Statements made by Brulay during interrogation by Mexican officials were properly admitted in the U.S. prosecution, as the trial preceded the effective date of *Miranda*, and no other violation of the fifth amendment rules occurred. 383 F.2d at 348.

112. 508 F.2d 904 (10th Cir.), *cert. denied*, 421 U.S. 949 (1975).

113. *Id.* at 907-08.

The fourth amendment governs the conduct of U.S. law enforcement officers wherever they act.[114] However, because no magistrate can issue a search warrant that has legal effect in Peru, the absence of a warrant in the hands of the U.S. agent is not crucial. Furthermore, in the typical criminal investigation abroad, its absence should be excused under traditional exigent circumstance law.[115] It would be unduly burdensome and time-consuming to require the transmission of information to a U.S. magistrate before permitting search or questioning abroad.[116] The exigent circumstance exception clearly was applicable in *Mundt*. The U.S. agent had probable cause to conduct the

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114. *See* note 22 *supra* & accompanying text.

115. Exceptions to the warrant requirement arise when immediate action is required and it would be unreasonable to secure a warrant. Examples include cases involving "hot pursuit," *see, e.g.*, Warren v. Hayden, 387 U.S. 294 (1967); searches incident to lawful arrest, *see, e.g.*, United States v. Robinson, 414 U.S. 218 (1973); and seizure of evidence in plain view, *see, e.g.*, Coolidge v. New Hampshire, 403 U.S. 446 (1971).

116. A warrant still should be a prerequisite for certain forms of U.S. conduct in foreign countries. For instance, a warrant should be required for wiretapping — particularly when it will continue over a period of time — since the intrusion is likely to be great and the need for immediate action is less. The U.S. Army's agreement to adhere to the warrant requirement when wiretapping U.S. citizens abroad suggests that compliance is not unduly burdensome. *See* Wash. Post, Apr. 15, 1980, § A, at 10, col. 1. The form of the warrant might differ from the form of domestic warrants. For example, the warrant might authorize, rather than command, certain searches and seizures. A judicial imprimatur would then be present, without our courts appearing to compel our officers to take any action in a foreign jurisdiction.

Even when exigent circumstances prevent U.S. officials from obtaining a warrant, other procedures could be employed to insure protection of fourth amendment rights. For instance, where time permits, agents could be required to record their reasons for undertaking a search prior to conducting it. This sworn affidavit would be submitted to a magistrate as soon as possible after the search is made. The writing would preserve an accurate record of the grounds for the search, and would afford an excellent opportunity to test the legality of the search after the fact.

search and acted reasonably in doing so. Both the search and arrest appear to have been proper under standard fourth amendment principles. In addition, the confession to a Peruvian official was neither coerced nor the fruit of illegal activity,[117] and thus was properly admitted under the fifth amendment.

Although the *Mundt* decision is correct on the facts of the case, its reasoning is not entirely sound. The principal difficulty with the opinion is its suggestion that a U.S. agent actively working with Peruvian authorities is outside the reach of the fourth amendment as long as the Peruvian authorities have some interest in enforcing their own law.[118] The better view is that the *active* participation of a U.S. agent should subject his conduct to the traditional requirements of reasonableness and probable cause, even though he is working with foreign officials. It might be argued that U.S. citizens residing in certain foreign countries have no legitimate expectation of privacy from governmental intrusion.[119] Although perhaps true vis-à-vis intrusion from foreign officials, it is not true vis-à-vis U.S. officials. The fourth amendment denies the latter the power to make searches that are unreasonable whenever they are exercising the authority of the United States. Even though the U.S. official in *Mundt* exercised that law enforcement authority with the permission of Peru, he was acting on behalf of the United States and was bound, therefore, to comply with the fourth and fifth amendments.

It might be argued further that no harm is done by cooperation with the foreign official, since the searches or

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117. Arguably, the interrogation, if conducted on behalf of, or at the request of, U.S. officials, should have been preceded by *Miranda* warnings. *See* note 150 *infra*.

118. 508 F.2d at 907. A similar suggestion is found in United States v. Nagelberg, 434 F.2d 585, 587 n.1 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971).

119. Stephan, *supra* note 29, at 780.

interrogations would proceed even absent U.S. assistance.[120] The response is that whatever motivations foreign officials may have to search or interrogate a U.S. suspect might be increased if the United States officially expresses its interest or offers to assist in the investigation. Constitutional protections should be available to the citizen whose search or interrogation is prompted by such official U.S. communications and offers. Whether the U.S. agent in *Mundt* hoped for a U.S. prosecution or a Peruvian one, the fourth amendment dictated the scope of that official's action.

C. Degrees of U.S. Participation

There are various degrees of participation in foreign law enforcement activities by U.S. officials which fall between provision of information and direct participation. In *United States v. Jordan,*[121] a U.S. airman living in England was suspected of burglary by the British police. The British authorities apparently had done all of the investigative work prior to the search that was challenged. The British police approached Jordan at his place of residence, asked questions, and finally coaxed him into consenting to a search of his room. U.S. Air Force police were present during the search, but took no part in it, other than to unlock a padlock on Jordan's footlocker and to look around the room.[122]

The Court of Military Appeals held initially that a foreign search, even if it is conducted wholly by foreign police operating on their own, must meet fourth amendment standards, at least if U.S. courts are to accept evidence seized by

120. *Id.* at 785.

121. The first opinion in the case is found at 23 C.M.A. 525, 50 C.M.R. 664 (1975). The modified opinion is found at 24 C.M.A. 156, 51 C.M.R. 375 (1976).

122. 50 C.M.R. at 665. These acts apparently were harmless.

the foreign police.[123] Upon reconsideration, the court held that, to be admissible, evidence seized by foreign officials acting independently of U.S. officers must be valid under applicable foreign law, and that a foreign search conducted under circumstances in which U.S. officers share responsibility must comply with the fourth amendment. The concept of responsibility was defined broadly to cover presence at the scene of a search, the provision of information, or direction that initiates or aids the foreign searches.[124]

On both points, the court erred. Its first mistake was even considering whether a foreign search conducted without U.S. involvement violated the law of the country in which the search took place. Foreign officials answer to their own country for any violation of local law. It is difficult to understand why U.S. courts should exclude such evidence, as long as it is reliable [125] and not the product of unlawful *U.S.* action against which the Constitution guards. U.S. judicial officers do no damage to their own image, to foreign relations, or to notions of comity among nations when they admit such evidence. Indeed, the opposite may be true. The failure of most foreign countries to suppress illegally seized evidence in their own courts,[126] for example, strongly

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123. *Id.* at 666.

124. 51 C.M.R. at 378.

125. Evidence obtained under circumstances suggesting a shocking violation of due process, for example, should be excluded because of doubts as to its reliability.

126. Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 216-18 (1978). Wilkey argues that the "irrationality" of the exclusionary rule is illustrated by the fact that "no other civilized nation in the world has adopted it." *Id.* at 216. Most foreign legal systems focus on the relevancy of the evidence introduced rather than on the methods by which it was obtained. *See generally* J. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 68-71 (1977) and Symposium, *The Exclusionary Rule Under Foreign Law*, 52 J. CRIM. L.C. & P.S. 271 (1961).

suggests that U.S. courts do them a disservice by excluding that same evidence.[127] Nor does it seem likely that exclusion of such evidence from U.S. courts will deter overreaching conduct by foreign officials — deterrence being a primary rationale for the exclusionary rule.[128] Conversely, it is difficult to imagine that decisions of U.S. courts to admit evidence seized solely by foreign officers encourage abuse of foreign law.[129]

The *Jordan* court's reasoning regarding the U.S. agents' roles in the search is little better. Once foreign officers decide to search the person or effects of a U.S. citizen, they may invite U.S. officials to be present as witnesses. Indeed, treaties or agreements may encourage such behavior.[130] To

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127. Furthermore, such exclusion may, in the long-run, result in less protection for U.S. citizens abroad. A country may decline to waive its primary jurisdiction over a case in which a U.S. court is likely to exclude reliable evidence that would be admissible in the host State. Thus, U.S. citizens would be denied the benefit of other constitutional protections afforded by the U.S. judicial system.

128. The exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." United States v. Calandra, 414 U.S. 338, 347 (1974).

129. *But see* Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980); Theis, *Choice of Law and the Administration of the Exclusionary Rule in Criminal Cases*, 44 TENN. L. REV. 1043 (1977).

130. One example is the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67. That agreement governs the relationship between U.S. troops in NATO countries and their host governments. Article VII, sec. 6(a) requires the parties to "assist each other in the carrying out of all necessary investigations into offenses and, in the collection and production of evidence, including the seizure and, in the proper cases, the handing over of objects connected with an offence." Article VII, sec. 3(b) states that the receiving State — *i.e.*, the State in whose territory the troops are stationed — will generally have primary jurisdiction. It may waive that jurisdiction, however, if specifically requested to do so by the sending State. *Id.* sec. 3(c). The United States has concluded substantially similar treaties with Australia, Iceland,

suggest that U.S. officials who go as witnesses thereby turn a foreign search into a U.S. one, however, is to deny U.S. citizens abroad a friend at a time when they most need one. The presence of U.S. officials may have a restraining effect on foreign official conduct, and alerts the United States to threatened actions against its citizens. These benefits would be lost if the U.S. presence consequently entitled a defendant to exclusion of evidence in U.S. proceedings, even where the U.S. official had not actively aided in acquiring such evidence. Foreign officials might be deterred in such event from inviting U.S. officials, or from declining primary jurisdiction and thus depriving the defendant of the full panoply of procedural protections available in U.S. courts. Therefore, the mere presence of a U.S. agent at a search not under his control should not bring that search within the proper coverage of the fourth amendment. On the facts of *Jordan*, where the British police searched and the U.S. police simply observed, there was no fourth amendment violation. The court need not have reached the question of whether to exclude the evidence, for it was not illegally seized.

The other problem with exclusion on the facts of *Jordan* is that even assuming actual participation of U.S. officials, the search would be legal under the exigent circumstances exception.[131] Apparently, there was probable cause for the search.[132] Only a warrant was missing. Requiring a warrant in a country that does not have a warrant procedure identical to that of the United States would make little sense. Because the U.S. officers had no control over the timing of the search in *Jordan*, they could not have obtained a warrant from a U.S. magistrate before participating.

Japan, the Philippines, and the United Kingdom. *See* Norton, *United States Obligations Under Status of Forces Agreements: A New Method of Extradition?*, 5 GA. J. INT'L & COMP. L. 1, 9-24 (1975).

131. *See* note 115 *supra*.

132. *See* 51 C.M.R. at 378-79.

A case that reaches the opposite result from *Jordan*, but that can be justified under the analysis presented here, is *United States v. Marzano.*[133] Marzano, who was suspected of taking more than three million dollars in federally insured bank funds from Purolator Security, Inc., had fled to Grand Cayman Island. The FBI gave Marzano's picture and a statement of his suspected activities to the Grand Cayman police. A Grand Cayman investigator allowed FBI agents to accompany him during the investigation and arrest. The Grand Cayman police arrested Marzano for refusing to give his name and address in violation of local law. Grand Cayman authorities, however, filed no charges and returned him to the United States. Evidence seized by the Grand Cayman investigator at Marzano's arrest was admitted in a U.S. prosecution.[134] The Seventh Circuit found that U.S. involvement in the Grand Cayman investigation and arrest did not constitute a governmental search entitling the defendant to fourth amendment protections. The *Marzano* panel therefore found the evidence seized in the Grand Cayman search properly admissible.[135]

If one assumes that the Grand Cayman investigators were concerned with protecting the integrity of their island and maintaining control of the investigation, then the FBI observers appear to have been in the same position as the air police in the *Jordan* case. In *Marzano*, however, it is by no means clear that the FBI agents were mere observers. They may have been working together with the Grand Cayman police. Unlike Jordan, Marzano was suspected of no local offense at the time of the investigation. Grand Cayman police therefore had little incentive to act other than to help U.S. officials investigate criminal activity that had occurred in the United States. Thus, the *Marzano* court

133. 537 F.2d 257 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

134. *Id.* at 269-70.

135. *Id.* at 271.

likely erred in characterizing U.S. involvement as insignificant. Although U.S. officials did not control the arrest and search, they were not passive observers. The *Marzano* court nonetheless need not have found a violation of the fourth amendment requiring exclusion of the evidence seized. Seizure of the evidence could have been sustained as a search pursuant to a lawful arrest. Under U.S. law, police may approach someone in order to ask questions, as long as there is a reasonable basis for doing so.[136] Thus, the Grand Cayman police did no more than a U.S. officer could have done when they approached Marzano. Whether or not Marzano's refusal to give a name and address would be something that could be punished here, the refusal in Grand Cayman was a crime. When it occurred in the presence of the Grand Cayman police, they acted lawfully in arresting and searching Marzano. A U.S. police officer making a lawful arrest also would have searched.[137] Thus, the *Marzano* court could have ruled that the FBI agents acted properly under U.S. law whether or not the degree of their cooperation with the Grand Cayman police was great enough to attribute the search and seizure to the U.S. agents.

What is disturbing about the opinion is its suggestion that because Grand Cayman police carried out the search, it is unimportant that FBI agents had instigated the investigation. In the *Brulay* case, the court also was quick to assume that Mexican authorities were investigating in order to enforce their own criminal law.[138] The two cases are distinguishable, however, in that the information provided by the U.S. agents in *Brulay* related to conduct that

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136. *See, e.g.*, United States v. Mendenhall, 100 S. Ct. 1870 (1980); Terry v. Ohio, 392 U.S. 1 (1968).

137. *See* United States v. Robinson, 414 U.S. 218 (1973).

138. 383 F.2d 345, 348 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967).

also was a crime under the Mexican law, while in *Marzano*, the defendant had not violated Grand Cayman law until after the investigation was initiated. These two cases demonstrate the important distinction between situations in which U.S. officials instigate or request an investigation and those in which such officials merely provide information that may assist foreign police in enforcing foreign laws.

D. A Proposed Standard

Much of the literature examining the fourth amendment's effect in foreign countries [139] analogizes to the old "silver-platter" cases [140] which the Supreme Court decided before *Mapp v. Ohio* [141] made the exclusionary rule binding on the states. Although of some interest, the usefulness of this analogy is limited. First, the Supreme Court never clearly articulated the degree of federal participation in state actions that required suppression of evidence in federal court.[142] Second, state officers generally were famil-

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139. *See, e.g.*, Note, *The Fourth Amendment Abroad: Civilian and Military Perspectives*, *supra* note 108; Note, *The New International "Silver Platter" Doctrine*, *supra* note 108.

140. The "silver platter" doctrine had its roots in dicta in two Supreme Court cases: Byars v. United States, 273 U.S. 28 (1927), and Gambino v. United States, 275 U.S. 310 (1927). The doctrine states that evidence obtained in an illegal state search is admissible in federal court as long as there is no federal participation in the search. It was discredited several years later in Elkins v. United States, 364 U.S. 206 (1960), just one year before *Mapp* made the entire inquiry academic. *See generally* Kamisar, Wolf *and* Lustig *Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959); *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 147 (1960).

141. 367 U.S. 643 (1961).

142. In Byars v. United States, 273 U.S. 28 (1927), exclusion was held to be required only when there was "a joint operation" of local and federal officers; "mere participation" was not enough. *Id.* at 32. In Lustig v. United States, 338 U.S. 74 (1949), the decisive factor was "the actuality of a share by a federal official in the total enterprise . . . ." *Id.* at 79. Finally, in Gambino v. United States, 275 U.S. 310 (1927), the Court held

iar with federal constitutional rules. Although a constitutionally based exclusionary rule was not imposed until 1961, state officers were bound to follow them after 1949.[143] In contrast, foreign law enforcement officers generally have little knowledge of U.S. law. Third, the federal government probably had the power under the supremacy clause [144] to compel state agents working with federal law enforcement officers to follow federal practice. However, because the federal government preferred to benefit from state-generated evidence, it did not choose to exercise this power.[145] No supremacy clause power exists over foreign nations, and there is nothing that the U.S. government can do to dictate the way in which foreign nations conduct their law enforcement activities. Fourth, federal and state authorities had such a close and continuing relationship that any joint activity between them would have been more suspect than the arm's-length cooperation between the United States and a foreign nation.

Another line of cases that might provide a helpful analogy for solving foreign search problems involves private searches. Since the fourth amendment applies only to the actions of government officials, warrantless searches and seizures by private persons do not violate the Constitution.[146] There comes a point, however, when the

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that evidence must be excluded when the illegal search is made solely on behalf of the United States. None of these cases dealt adequately with the problem of distinguishing between constitutional and unconstitutional behavior by federal officials. The difficulty in deciding when to rely on the "silver platter" doctrine well may have encouraged the decision in *Mapp*.

143. *See* Wolf v. Colorado, 338 U.S. 25 (1949).

144. U.S. CONST. art. VI.

145. *See* Omnibus Crime Control and Safe Streets Act of 1968, tit. III, ch. 119, 18 U.S.C. §§ 2511, 2515 (1976).

146. *See, e.g.*, Walter v. United States, 100 S. Ct. 2395 (1980). It is settled "that a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment." *Id.* at 4807.

relationship between a private person and the government approaches agency and brings the private activities within the coverage of the Bill of Rights.[147] Although interesting, analogy to the relationship with foreign officers is imperfect.

Several factors operate to curb excessive action in private search situations. Private citizens have no authority to make searches and seizures of another's property. If asked to aid a police investigation, citizens are unlikely to take the request as an invitation to violate trespass or property laws. Second, because private persons take personal risks when they work with police agents, their actions may be less bold. Third, private citizens generally respect the sanctity of private property, and may be reluctant to invade the privacy of others. Finally, absent an explicit police request, it is doubtful that a private person would attempt to search [148] or interrogate another citizen, because such conduct is extremely rare outside the law enforcement context.

When foreign officials act as U.S. agents, no similar constraints curb their conduct. Foreign agents have their own investigative procedures.[149] They are not bound by U.S. concepts of privacy or individual freedom. They may operate under a system in which searches and seizures upon any or no suspicion are reasonable. Interrogation is a familiar part of their police work. Thus, although the request for

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147. *See, e.g.*, Walter v. United States, 100 S. Ct. 2395 (1980); United States v. Fannon, 556 F.2d 961 (9th Cir.), *cert. denied*, 441 U.S. 948 (1979); United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1975).

148. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1970).

149. Commonwealth and continental legal systems generally rely more upon police self-restraint, and deal more directly with official misconduct, rather than depend on an evidentiary remedy such as the exclusionary rule. *See generally* J. LANGBEIN, *supra* note 126, at 69; Farrar, *Aspects of Police Search and Seizure Without Warrant in England and the United States*, 29 MIAMI L. REV. 491 (1975).

assistance will make the foreign officials "agents" of the U.S. government for fourth and fifth amendment purposes, the United States will have far less control over the way in which its request is handled. It is incorrect, therefore, to apply to the actions of foreign officials the same standards applied to private persons who act as agents of the federal government.

This article proposes an alternative analysis. The initial question is whether U.S. officers have engaged in conduct in a foreign country that would be considered a search or interrogation if performed in the United States. If so, they should comply with the constitutional standards applicable in the United States. If they have not participated to this extent, the second question is whether they have taken some action reasonably construed as a request for the assistance of foreign law enforcement personnel. If so, then they should indicate specifically what they want done,[150] and request only such action as they themselves could have taken under

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150. For example, a U.S. officer could ask that foreign officers watch someone in whom the United States is interested. He could specifically state that no search or interrogation should take place until a firm request for such activities is made. Such a request would require probable cause. If probable cause existed, the U.S. official could direct the searchers to particular items to be found in particular places. If interrogation were to be conducted, U.S. agents could ask that the suspect be told that he did not have to say anything and that he had the right to consult with U.S. officials if he wanted. (*Miranda* would have to be modified in many instances to reflect the reality that counsel would not be available.) Foreign officials might not give warnings as effectively as U.S. officials (or they might do a better job, not knowing that the warnings often are given in the most perfunctory way possible), but some warning would be better than none.

The most difficult case will arise when foreign and U.S. officers go to make an arrest together and the foreign officers want to ask questions in a jurisdiction in which silence can be used against the person. Here, all the U.S. officials can do is inform the suspect of his rights against them, even though exercise of those rights might be prejudicial in the foreign prosecution.

the Bill of Rights. As long as U.S. officials request only those actions which they could take lawfully in the United States, they have done all that the Constitution requires. When a foreign government is independently interested in a foreign search, the decision whether to comply with the U.S. request or to go beyond it is up to foreign officials. All the United States can ask is that foreign agents do not violate U.S. legal principles because of a request that U.S. agents have made.[151] No purpose would be served by

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151. This article addresses actions by U.S. officials ranging from performance of, or assistance in, searches and seizures and interrogations, to requests for assistance from foreign governments, who might be treated as agents of the United States. The focus is on U.S. law enforcement activities. The issues raised are quite different from those raised in connection with prisoner transfer treaties such as the United States-Mexico agreement. Treaty on the Execution of Penal Sentences, Nov. 25, 1976, United States-Mexico, 28 U.S.T. 7399, T.I.A.S. No. 8718. Similar treaties have been signed with, *inter alia*, Canada, Treaty on the Execution of Penal Sentences, Mar. 2, 1977, United States-Canada, — U.S.T. —, T.I.A.S. No. 9552, and Bolivia, Treaty on the Execution of Penal Sanctions, Feb. 10, 1978, United States-Bolivia, — U.S.T. —, T.I.A.S. No. 9219. The cases had been divided on the validity of consent obtained from people in Mexican jails and prisons. *Compare* Velez v. Nelson, 475 F. Supp. 865 (D. Conn. 1979), *rev'd sub nom.* Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980) (district court found waiver invalid but was reversed) *with* Mitchell v. United States, 483 F. Supp. 291 (E.D. Wis. 1980) *and* Pfeifer v. United States, 468 F. Supp. 920 (C.D. Cal. 1979), *aff'd*, 615 F.2d 873 (9th Cir. 1980) (validating consent). With the *Rosado* decision, the Second Circuit aligned itself with other courts on the waiver issue. *Compare also* Bassiouni, *Perspectives on the Transfer of Prisoners Between the United States and Mexico and the United States and Canada*, 11 VAND. J. TRANSNAT'L L. 249 (1978) (in favor of transfer treaties) *with* Paust, *The Unconstitutional Detention of Mexican and Canadian Prisoners by the United States Government*, 12 VAND. J. TRANSNAT'L L. 67 (1979) (opposed to transfer treaties on constitutional grounds). *See generally* Abramovsky & Eagle, *A Critical Evaluation of the Newly Ratified Mexican-American Transfer of Penal Sanctions Treaty*, 64 IOWA L. REV. 275 (1979); Robbins, *A Constitutional Analysis of the Prohibition Against Collateral Attack in the Mexican-American Prisoner Exchange Treaty*, 26 U.C.L.A.L. REV. 1 (1978); Vagts, *A Reply*

excluding the evidence that they may produce as a result of compliance with their own laws, because the exclusionary remedy is aimed at deterring abusive U.S. governmental action.[152]

Application of the two-pronged analysis suggested here can be illustrated by the facts of *Stonehill v. United States.*[153] *Stonehill* is a tax case [154] in which an informant

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to "A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty," 64 IOWA L. REV. 325 (1979).

When a country such as Mexico accuses, tries, convicts, and imprisons a suspect, that country is enforcing its law in accordance with its procedures. It is not acting on the behalf of or at the request of the United States. It is not subject to U.S. constitutional rules, nor is it subject to commands of U.S. law enforcement officers. A prisoner transfer treaty allows persons who would find U.S. prisons preferable to Mexican prisons to return here to serve a sentence. Such a treaty does not vindicate or approve of Mexican law and procedure; it simply recognizes that Mexican law and procedure are not controllable by U.S. law. Thus, a transfer makes people better off by improving the conditions of their incarceration without affecting the underlying conviction. Arguably, a finding that any consent to transfer is invalid because of duress should result in the restoration of the status quo ante — *i.e.*, U.S. citizens would be returned to Mexican jails. Since prisoners do not desire this result, and since invalidating all consents makes it unlikely that the treaty would be used, it is difficult to see why U.S. courts would want to hold consents to be invalid. It seems that no one is hurt by the treaty and many are benefited.

This is not to suggest that such treaties are preferred means of protecting U.S. citizens. There may be much better ways. *See* Abramovsky, *A Critival Evaluation of the American Transfer of Penal Sanctions Policy,* [1980] WISC. L. REV. 25. It is to suggest, however, that courts should be reluctant to interfere with the operation of treaties when they are the only device available at the moment to handle such problems.

152. *See* note 128 *supra* & accompanying text.

153. 405 F.2d 738 (9th Cir.), *cert. denied*, 395 U.S. 960 (1969).

154. Thus, it is a good reminder that the important issue often is what the Constitution requires, not the scope of an exclusionary remedy in criminal cases. *Stonehill* and *Marzano*, *see* notes 133-38 *supra* & accompanying text, demonstrate that although many U.S. investigations abroad concern drug traffic, other subjects are involved. Overzealous activities on the part of drug agents have led to congressional control in

suggested that Stonehill was avoiding payment of U.S. taxes. U.S. officials brought this information to the attention of Philippine authorities and encouraged them to meet with the informant and to take investigative action. Although the U.S. agent suggested that a raid not take place, Phillippine officials did conduct a search and seized evidence that was later used in holding Stonehill liable for U.S. taxes.[155] The court held that the U.S. agent had not "so substantially participated in the raids . . . as to convert them into joint ventures between the United States and the foreign officials."[156] One dissenter argued that U.S. officials were sufficiently involved to require suppression of the evidence.[157]

The first question should have been whether U.S. officials conducted an illegal search and seizure. There is little doubt in *Stonehill* that the answer is no. Nothing that they did would have amounted to a search and seizure if conducted in the United States. The Philippine authorities were independently interested in investigating Stonehill in connection with deporting him as an undesirable person.

The second question is more difficult: Did the U.S. official make a request for investigative help? A U.S. official alerted Philippine authorities to Stonehill's activities and urged that something be done. Before the raid, the U.S. official made arrangements to copy any documents seized.[158] Although the official did not join the raiding party and even attempted to discourage it, it is not clear whether the agent was opposed to the raid altogether, or merely to its timing. An additional important fact is that part of the planning for the raid took place in the U.S. agent's house.

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the form of a statute that bars drug agents from being at the scene of searches and seizures in other lands. 22 U.S.C. § 2291(c) (1976).

155. 405 F.2d at 741-42.

156. Id. at 743.

157. *Id.* at 749-50 (Browning, J., dissenting).

158. *Id.* at 741.

The opinion's report of the facts is insufficient to answer the second question. The important thing is that the court should have addressed it. If Philippine officials considered the actions of the U.S. tax officials as a request for help, then the U.S. agent should have specified exactly what form of aid he desired. The aid requested should not have included actions that the U.S. tax officials could not have taken themselves without violating the fourth and fifth amendments.

Assuming that the fourth amendment applied to the action requested of the Philippine officials, the next question is whether the fourth amendment was violated. The absence of a warrant may not be determinative.[159] If there was probable cause, then the fourth amendment, while applicable, was not violated and the seized evidence need not have been suppressed.

E. Suppression of Evidence Generally

The foregoing discussion should demonstrate that fourth and fifth amendment issues, when properly analyzed, are only slightly more difficult in a foreign context than in ordinary domestic criminal cases. Motions to suppress evidence from searches outside U.S. territory should be decided on the same grounds as motions to suppress evidence obtained from domestic searches.[160] The various arguments regarding the exclusionary rule [161] neither gain nor lose

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159. *See* notes 115-16 *supra* & accompanying text.

160. Recent decisions have attempted to balance the deterrent effect of the use of the exclusionary rule against the cost to society of losing the evidence. *See, e.g.,* United States v. Janis, 428 U.S. 433, 453-54 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974).

161. *Compare* Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?,* 62 JUDICATURE 67 (1978) *and* Kamisar, *The Exclusionary Rule in Historical Perspective,* 62 JUDICATURE 315 (1978) (favoring the exclusionary rule) *with* the dissent of Mr. Chief Justice Burger in *Bivens,* 403 U.S. at 411-27 (Burger, C.J., dissenting) (opposing the exclusionary rule).

force in the context of high seas and foreign searches. An unfortunate, myopic focus on the scope of the exlusionary remedy has caused many courts and commentators to miss the essential problem — *i.e.*, whether and how the fourth and fifth amendments apply in a given case.

Some cases [162] and commentaries [163] suggest that the due process clause, rather than the specific provisions of the fourth and fifth amendments, ought to produce a remedy for misconduct by U.S. officials abroad. The difficulty with this suggestion is that "due process" is used to blur the distinction between U.S. action and processes and those of foreign States and their officials. If a due process violation is attributable to U.S. officials under the two-pronged test suggested above, then whatever remedy is provided in the standard criminal case should be available, even though the challenged action takes place on the high seas or in foreign territory. Conversely, if foreign officials, acting on their own, violate our concepts of due process or fair procedure, evidence should not be suppressed unless it is unreliable and would distort our factfinding process. As long as foreign officials act without a prohibited degree of U.S. participation, the Constitution says nothing about the legitimacy or illegitimacy of their actions. It does, however, require that U.S. proceedings be conducted fairly. Unreliable evidence (such as coerced confessions) may be excluded in order to protect the factfinding process — not to control the activities of foreign law enforcement personnel.

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162. *See, e.g.*, United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). While *Toscanino* purports to rely on the fourth amendment rather than the due process clause, later cases have suggested that the crucial factor in the case was the allegation of brutal torture that accompanied the defendant's kidnapping and return to this country, rather than the illegality of the seizure. *See* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1974), which suggests that due process considerations were primary.

163. *See, e.g.*, Note, *The Applicability of the Exclusionary Rule*, *supra* note 108, at 514-19.

There may be, however, conduct so shocking that it not only violates U.S. notions of due process, but also violates fundamental international norms of decency.[164] Because those norms which are part of international law incorporated in domestic law,[165] courts may want to exclude evidence obtained abroad by foreign officials in violation of such norms in order to demonstrate that no civilized nation should countenance violations of fundamental human rights.[166] Before deciding that a human rights violation has occurred, courts must carefully consider the views of both the Congress and the executive branch. In light of the impact of such a decision on U.S. foreign relations, both branches should participate in defining those internationally recognized human rights whose violation will warrant exclusion.[167]

IV. Conclusion

This article attempts to demonstrate how courts should resolve claims that U.S. law enforcement officers abroad and on the high seas have acted in violation of the Constitu-

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164. *See, e.g.*, the substantive norms established by international human rights instruments such as the Universal Declaration of Human Rights, *signed* Dec. 10, 1948, G.A. Res. 217A, at 71, U.N. Doc. A/810 (1948) and the Declaration of the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 9, 1975, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975).

165. The Paquete *Habana*, 175 U.S. 677, 700 (1900). *See also* Restatement (Second) of Foreign Relations Law § 3 (1965).

166. *Cf.* Cooley v. Weinberger, 518 F.2d 1151 (10th Cir. 1975); Brennan v. University of Kansas, 451 F.2d 1287 (10th Cir. 1971) (in both cases, the Tenth Circuit noted that conduct by foreign officials may be so shocking as to require exclusion, but that the conduct in the given cases was not sufficiently barbarous to require that result).

167. It is less likely that those parts of the executive branch charged with enforcing the law will favor the suppression of much evidence, even for a lofty ideal. *See* notes 12-14 *supra* & accompanying text.

tion. A two-pronged test for judging the constitutionality of such actions has been suggested. It is a test that makes the provisions of the Bill of Rights meaningful whenever and wherever the United States seeks to assert its authority.[168] The test also recognizes that the United States should and can cooperate with other governments to combat crime. Although it is not always easy both to reaffirm our own constitutional values and to promote harmonious international cooperation, the attempt must be made.

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168. One of the implications of this approach is that the government must use its treaty power in a manner consistent with the fourth and fifth amendments. Searches should be conducted in accordance with existing treaties only to the extent that the treaty establishes procedures that are constitutional.

Enforcement of U.S. Laws at Sea — Selected Jurisdictional and Evidentiary Issues*

Ved P. Nanda

I. Introduction

The United States' efforts to curb the so-called "Latin-American connection" in drug smuggling by intercepting drug traffic at sea, often involving warrantless searches and seizures by the Coast Guard, raise issues of jurisdiction as well as admissibility of the evidence so acquired.[1] Similar questions are raised by U.S. searches and seizures in connection with the implementation of the Fishery Conservation and Management Act of 1976.[2] Challenges to the application of U.S. law over offenses committed at sea generally relate to jurisdiction over the crimes and/or defendants themselves and to the admissibility of evidence seized under the fourth amendment; they arise from issues of nationality of both vessels and defendants, location of apprehension and search, and the authority of the boarding party.[3]

* I am deeply grateful to Professor Richard Lillich at the University of Virginia Law School and Professor Lawrence Tiffany at the University of Denver College of Law for their helpful suggestions in preparing this chapter, and wish also to thank Katharine Kunz, a third-year student at the University of Denver College of Law, for her valuable research assistance.

1. *See generally* Carmichael, *At Sea with the Fourth Amendment*, 32 U. Miami L. Rev. 51 (1977); Ficken, *The 1935 Anti-Smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law*, 29 U. Miami L. Rev. 700 (1975); Kaplan, *The Applicability of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained in Foreign Countries*, 16 Colum. J. Transnat'l L. 495 (1977); and Note, *High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 Harv. L. Rev. 725 (1980).

2. 16 U.S.C. §§ 1801-1822 (1976).

3. Different statutes define the authority of the United States Coast

This comment will address a few selected legal issues regarding the assertion of U.S. jurisdiction over vessels and persons on board for the enforcement of U.S. laws in the internal and territorial waters and the contiguous zone of the United States and on the high seas.

II. Challenges To U.S. Jurisdiction — Drug Traffic Cases

A. U.S. Flag Vessels Anywhere and non-U.S. Flag Vessels in U.S. Waters

The Fifth Circuit of the United States Court of Appeals has heard a large majority of the recent cases, and its decisions have set a trend regarding the issues both of jurisdiction and admissibility of evidence. The first important case

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Guard and customs officials to stop and search under different conditions. The statutory provision granting such authority to the Coast Guard states that it may make:

> . . . searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States . . . and search the vessel and use all necessary force to compel compliance. . . .

14 U.S.C. § 89 (1976). The corresponding statute for the federal customs authorities, 19 U.S.C. § 1581(a) (1976), provides in part:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or . . . within a customs-enforcement area established under the Anti-Smuggling Act [19 U.S.C. § 1701 *et seq.* (1976)] . . . and search the vessel or vehicle and every part thereof. . . .

Under *id.* § 1401(i), commissioned, warrant, and petty officers of the Coast Guard are considered officers of the customs. *Id.* § 1401(j) defines customs waters as extending four leagues (approximately 12 nautical miles) from the coast.

was *United States v. Warren*,[4] in which an American-registered vessel was boarded by Coast Guard officers on the high seas for the purpose of conducting a safety and documentation inspection. While lawfully on board, the officers became aware of the presence of a large quantity of marijuana.[5] They arrested and questioned the defendants and confiscated the contraband. On first appeal from their conviction,[6] defendants obtained a reversal, principally on the ground that the boarding party comprised customs as well as Coast Guard officers, and customs agents are unauthorized to board, question, or search without probable cause to suspect customs violations. Indeed, said the court, not even the Coast Guard would have had such authority in going beyond the scope of a safety inspection.[7] But in 1978, the Fifth Circuit Court of Appeals, sitting en banc on appeal,[8] reversed the earlier panel decision 8-6, and established the rule that Coast Guard authority under 14 U.S.C. § 89(a) is plenary as to American-flag vessels beyond the 12-mile contiguous zone,[9] that is, "the Coast Guard is empowered under section 89(a) to seize and board vessels of the American flag on the high seas without probable cause or any other particularized suspicion."[10] The court clarified the law and established precedents regarding the boarding, searches, and seizures in United States coastal waters of U.S. flag vessels and the enforcement of U.S. laws against U.S. as well as foreign nationals on board such vessels.

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4. 550 F.2d 219 (5th Cir. 1977), *rev'd*, 578 F.2d 1058 (5th Cir. 1978) (en banc).

5. An independent issue was the defendants' possession of $41,500 and 46,800 Colombian pesos, for which they were charged with transporting more than $5,000 from the United States without filing a report.

6. 550 F.2d 219 (5th Cir. 1977).

7. *Id.* at 225.

8. 578 F.2d 1058 (5th Cir. 1978) (en banc).

9. *Id.* at 1064-65.

10. *Id.* at 1068.

On the heels of *Warren*, in the fifth circuit, came *United States v. Whitmire*,[11] *United States v. Serrano*,[12] and *United States v. Conroy*[13] in 1979. *Whitmire* involved an American-registered vessel and American defendants. They were sighted by customs agents upon entering an intercoastal waterway, inside the shoreline, and by their outward appearance aroused the suspicion of the agents that there might be smuggling in progress. After an unsuccessful document search at the dock, the agents boarded and were led by the scent of marijuana to discover the evidence that was contested by the defendants on fourth amendment grounds. The right to board and search without a warrant was validated solely on the basis of 19 U.S.C. § 1581(a).[14] Concerned with the constitutional challenge presented by the fourth amendment to that statute, the court explored at length the development of search and seizure law and its application to vessels at sea. Under the rule of *Almeida-Sanchez v. United States*,[15] the court said, probable cause was required where a warrantless customs search was not made at the border or its functional equivalent,[16] to discourage boarding and searching "for drugs on the 'pretext' of the need to check documents or safety equipment."[17] And under *Rakas v. Illinois*,[18] there was the added consideration of reasonable expectation of privacy in the area searched,[19] obviously greater in the case

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11. 595 F.2d 1303 (5th Cir. 1979).

12. 607 F.2d 1145 (5th Cir. 1979).

13. 589 F.2d 1258 (5th Cir. 1979).

14. *See* note 3 *supra* for the statutory provision 19 U.S.C. § 1581(a) (1976).

15. 413 U.S. 266 (1973).

16. The "functional equivalent" is an area such as a harbor where boats first land, upon coming across the border, since they cannot be lined up to progress one-by-one through the customs zone for inspection.

17. 595 F.2d at 1312.

18. 435 U.S. 922 (1978).

19. *See also* United States v. Coats, 611 F.2d 37 (5th Cir. 1979), in which the court found the defendant without standing to object to the

of a vessel used as quarters by its crew than that of an automobile, but also greater in some parts of the boat than in others.[20] The requirement for a search warrant was to be dispensed with in proper circumstances, pursuant to "the policies behind several traditionally discrete exceptions to the warrant requirement — the border search doctrine, the administrative inspection exception for certain regulated industries, and the automobile-exigent circumstances doctrine — [which in the maritime context] uniquely converge."[21] Thus, where a sufficient degree of probable cause — "sufficient articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" [22] — exists, a warrantless search of a vessel properly within the jurisdiction will be tolerated, even absent known border crossing facts required for search prior to *Warren.*[23]

In *United States v. Serrano,*[24] a Colombian vessel was

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admissibility of evidence against him which was seized without a warrant and without probable cause or suspicion of any criminal activity on the part of the Coast Guard. As he was the subordinate of a third party, who was entitled to possession of the vessel, he (defendant) had no protected expectation of privacy in the vessel and could not protest the search.

20. 595 F.2d at 1312. *See also* United States v. Willis, 476 F. Supp. 201 (E.D. La. 1979), in which the crew of a fishing vessel on the high seas, apprehended by the Coast Guard on a documentation and safety inspection that was admittedly for the primary purpose of uncovering contraband marijuana, were held not privileged to object to a search of the fish hold, for:

> crews of commercial vessels should know and expect that the hold may be subject to routine inspection by the Coast Guard or Customs when the vessel leaves or enters a U.S. port. There is no reason why the hold of a commercial vessel should be considered any more private when the vessel is on the high seas.

Id. at 203.

21. 595 F.2d at 1315.

22. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

23. 595 F.2d at 1315.

24. 607 F.2d 1145 (5th Cir. 1979).

apprehended in inland waters by customs officers under their statutory investigatory authority.[25] The officers had developed a reasonable suspicion [26] of illegal activity, which was adequate at law under the rule of *Whitmire*.[27] The nationality of the defendants did not raise an issue because of the location of the apprehension.[28]

In *Warren*, *Whitmire*, and *Serrano*, the court's jurisdiction over the vessel, the parties, and sufficient elements of the crime itself — whether it be possession with intent to distribute or with intent to import, or conspiracy to commit one of these offenses — was not disputed; a major concern in these cases was the effect on the admissibility of evidence under the fourth amendment, of warrantless search conducted without probable cause or with probable cause that was determined according to ill defined or imprecisely articulated standards.[29] *United States v. Conroy*,[30] however, presented a different situation; the defendants and their vessel were American, but the stop occurred in the territorial waters of Haiti.

Under international law, while States are obligated to

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25. 19 U.S.C. § 1581(a) (1976).

26. A suspicion "... based on 'sufficient articulable facts to support an inference' that the vessel was involved in smuggling contraband." United States v. Castro, 596 F.2d 1303 (5th Cir. 1979), *cert. denied*, 444 U.S. 963 (1979). "The evidence need not support suspicion of a border crossing, but only of the presence of contraband." 607 F.2d at 1149.

27. 595 F.2d 1303 (5th Cir. 1979).

28. *See* extended discussion, *infra*, on the distinction made in international and domestic law when the defendant is a non-U.S. national.

29. The boarding in *Warren* was not predicated on the basis of any particularized suspicion or probable cause. For a case where a Coast Guard search was invalidated as being unreasonable, see United States v. Piner, 608 F.2d 358 (9th Cir. 1979), where the search was pursuant to a random scheme of stopping and boarding for safety and registration inspection after dark, without any suspicious circumstances, and bags of marijuana below deck were found in plain view.

30. 589 F.2d 1958 (5th Cir. 1979).

maintain safety standards for the vessels flying their flags[31] they offer protection to such vessels and to their crews against incursion by any other State's warships on the high seas[32] and their laws apply to actions on board.[33] Also, States are authorized under international law to apply their laws to any vessel in their territorial waters and to certain vessels in their contiguous zones and on the high seas.[34] However, *United States v. Conroy*[35] enunciated the extension of the long established principle under which the authority of the United States to impose its jurisdiction over American-flag vessels is plenary, regardless of where they might be found on the high seas,[36] to American vessels found by the Coast Guard in foreign waters.[37]

In *Conroy*, the American vessel was apprehended by the Coast Guard in the territorial waters of Haiti. Customary practices of seamen dictated that the investigating vessel obtain leave of the government of Haiti before entering its territorial waters,[38] but the court acknowledged that the Convention on the Territorial Sea and the Contiguous Zone[39] had "rejected any requirement of previous authorization by a coastal state for free entry of a foreign

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31. *See* article 10, Convention on the High Seas, *opened for signature* April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962) [hereinafter cited as the High Seas Convention].

32. *See* article 5 of the High Seas Convention. Coast Guard vessels are included in the definition of "warships."

33. Articles 5, 6 of the High Seas Convention.

34. For a comprehensive and insightful discussion of the various claims in these areas, *see* M. McDougal & W. Burke, The Public Order of the Oceans, 269-302, 582-630, 885-923, 1051-1140 (1962).

35. 589 F.2d 1258 (5th Cir. 1979).

36. *See, e.g.*, Maul v. United States, 274 U.S. 501 (1927).

37. 589 F.2d at 1266.

38. *Id.* at 1267.

39. Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964).

warship into its territorial waters." [40] Relying on the history of section 89(a), the court interpreted the phrase "upon the high seas and waters over which the United States has jurisdiction" as not being intended to delimit the authority "granted by inference" [41] to the Coast Guard, "implied as an incident of the police duties of ocean patrol which Congress has imposed upon the Coast Guard." [42] As to such authority the court concluded: "The pattern of legislation from 1790 to 1927 traced by Mr. Justice Brandeis [in *Maul*] and the subsequent congressional action we have here discussed, make it clear that, in the absence of objection by the sovereign power involved, Congress intended the Coast Guard to have authority to stop and search American vessels on foreign waters as well as on the high seas and in territorial waters even though it never said so with unequivocal didacticism." [43] Although the defendants objected to their apprehension in foreign waters, the court denied them any relief, even if their claim were proper, on the ground that if an improper intrusion was an offense at all it was an offense only to the foreign sovereign whose territoriality had been infringed.[44]

The 1979 District of Puerto Rico case, *United States v. Hayes*,[45] analyzed at length the legal bases for extraterritorial application of United States law to offenses committed abroad, especially at sea. It referred to the law

40. 589 F.2d at 1267.

41. *Id.* at 1266.

42. 274 U.S. at 512 (Brandeis, concurring).

43. 589 F.2d at 1266-67.

44. *Id.* at 1268. The *Conroy* court cited as authority *The Richmond*, 13 U.S. (9 Cranch) 102 (1815), in which Chief Justice Marshall said "[t]he seizure of an American vessel, within the territorial jurisdiction of a foreign power, is certainly an offense against that power, which must be adjusted between the two governments. This court can take no cognisance of it." *Id.* at 103.

45. 479 F. Supp. 901 (D.P.R. 1979).

of the flag principle [46] as recognized in Article I, Section 8, Clause 3 of the United States Constitution,[47] the special maritime jurisdiction statute, 18 U.S.C. § 7,[48] and case law.[49] Although it is a variation of the territorial principle generally used for criminal jurisdiction, the law of the flag principle broadens its reach so as to provide for "offenses . . . such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute violated." [50] The court also noted the well established principle that the nature of the offense proscribed in a statute can imply the Congressional intent to provide for its application extraterritorially. For example, while the Comprehensive Drug Abuse Prevention and Control Act of 1970 [51] explicitly applies extraterritorially to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States for the purposes of unlawful importation,[52] the absence of clear

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46. "[A] fiction is created whereby the ship is part of the territory whose flag it flies and whose protection it sails under." *Id.* at 912.

47. "The Congress shall have Power . . . to regulate Commerce with foreign Nations." U. S. CONST. art. I, § 8, cl. 3.

48. Special maritime and territorial jurisdiction of the United States defined:

> The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes: (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof . . . when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

18 U.S.C. § 7 (1976).

49. The *Hayes* court cited as authorities United States v. Flores, 289 U.S. 137 (1933), and Lauritzen v. Larsen, 345 U.S. 571 (1952).

50. 479 F. Supp. at 912.

51. 21 U.S.C. §§ 801-966 (1976).

52. The Comprehensive Drug Abuse Prevention and Control Act of 1970 states:

> Manufacture or distribution for purposes of unlawful importation. . . . This section is intended to reach acts of manufacture

language in other parts of the Act [53] and other instruments, such as the 1961 Single Convention on Narcotic Drugs [54] (which were enacted to interdict importation and distribution of controlled substances into the United States) did not mean that Congress intended to exclude the extraterritorial application of these laws.

Similarly, in *United States v. Perez-Herrera*,[55] the fifth circuit recognized the presumption of territoriality of jurisdiction [56] and developed the same argument as in *Hayes*, that extraterritorial application and enforcement were dependent upon congressional intent, and "such congressional intent may be gleaned from the clear purpose of smuggling statutes." [57]

The objective territorial theory of jurisdiction was well articulated in two recent cases, *United States v. Baker* [58] and *United States v. Mann*.[59] This theory is based on the need of a State to protect its integrity and provides justification to exercise jurisdiction when acts done outside the territory are intended to produce harmful effects within it.[60] This theory has generally required proof of the defendant's actions having an effect within the jurisdiction, or proof of a conspiracy, combined with some acts in furtherance of such conspiracy which took place within the

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or distribution committed outside the territorial jurisdiction of the United States. Any person who violates this section shall be tried in the United States district court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia.

Id. § 949.

53. *See, e.g., id.* §§ 841(a)(1), 952(a).

54. 18 U.S.T. 1407, T.I.A.S. 6298, 520 U.N.T.S. 204.

55. 610 F.2d 289 (5th Cir. 1980).

56. *Id.* at 290.

57. *Id.*

58. 609 F.2d 134 (5th Cir. 1980).

59. 615 F.2d 668 (5th Cir. 1980).

60. *See* Strassheim v. Daily, 221 U.S. 280 (1911). *See also* United States v. Columba-Colella, 604 F.2d 356 (5th Cir. 1979).

jurisdiction. As the *Baker* court noted, under the conspiracy section of the Comprehensive Drug Abuse Prevention and Control Act of 1970,[61] no overt act in furtherance of the conspiracy needs to be proven to sustain a conviction, based upon a strong presumption of intent to distribute found in the evidence.[62] However, while the court left unanswered the question whether "proof that any acts whatsoever took place in United States territory" [63] is required beyond proof of intended territorial effects, it held that since the vessel in question was in the contiguous zone when apprehended, the crime of possession with intent to distribute [64] required no more than the proof of such intent. And the *Mann* court, dealing with charges of conspiracy to import and to possess with intent to distribute, as to defendants apprehended on the high seas, stated the rule clearly: "When a conspiracy statute does not require proof of overt acts, the requirement of territorial effect may be satisfied by evidence that the defendants intended their conspiracy to be consummated within the nation's borders." [65]

B. Non-U.S. Flag Vessels over the High Seas

In pursuit of its goal to curb drug traffic, the Coast Guard has recently asserted jurisdiction, under 14 U.S.C. § 89(a), over non-U.S. flat vessels beyond the 12-mile contiguous zone sanctioned under the 1958 Convention on the Territorial Sea and the Contiguous Zone.[66] In this area, commonly

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61. 21 U.S.C. § 963 (1976).

62. 609 F.2d at 138.

63. *Id.* at 139.

64. 21 U.S.C. § 841(a)(1) (1976).

65. 615 F.2d at 671.

66. *See* note 38 *supra*. Although the ongoing negotiations for a comprehensive treaty on the law of the sea have yet to resolve a few remaining issues, there is consensus on the breadth of the territorial waters to be up to 12 miles and of contiguous zones to be up to 24 miles from the coast. *See* the Revised Informal Composite Negotiating Text of the United Nations Conference on the Law of the Sea, arts. 3, 33, U.N. Doc.

known as the high seas, freedom of the seas has been traditionally the governing principle,[67] which was later codified in the 1958 Convention on the High Seas (the High Seas Convention).[68] Thus, jurisdictional questions are naturally encountered in U.S. courts regarding the validity of the Coast Guard action in seizing non-U.S. vessels and arresting persons aboard for allegedly violating domestic conspiracy statutes [69] to smuggle contraband.

Pertinent provisions of these conventions include articles 1 and 24 of the Convention on the Territorial Sea and the Contiguous Zone (CTSCZ) and articles 5, 6, 22 and 23 of the High Seas Convention. While under article 1 of CTSCZ, the sovereignty of a coastal State extends into the territorial sea, and articles 14-23 provide for the right of innocent passage for foreign vessels, article 24 established a zone of the high seas contiguous to the territorial sea and recognizes a coastal State's special interests to permit it to exercise the control necessary to:

> (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
>
> (b) Punish infringement of the above regulations committed within its territory or territorial sea.
>
> 2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured. . . ."

Articles 5 and 6 of the High Seas Convention read in part:

A/Conf. 62 WP. 10 Rev. 1 (1979), reprinted in 18 INT'L. LEGAL MATERIALS 686, 703, 709 (1979).

67. *See, e.g.*, Houston, *Freedom of the Seas: The Present State of International Law*, 42 AM. B. ASS'N J. 235 (1956).

68. *See* note 30 *supra*.

69. *See, e.g.*, 21 U.S.C. §§ 841, 846, 952, 960, 963 (1976).

Article 5

1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly.

Article 6

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. . . .

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

Article 22 of the High Seas Convention codifies the traditionally accepted principle of the right of approach or visitation and article 23 authorizes hot pursuit of a foreign vessel beyond 12 miles. Pertinent parts of these articles follow.

Article 22

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(a) That the ship is engaged in piracy; or

(b) That the ship is engaged in the slave trade; or

(c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

Article 23

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted.... If the foreign ship is within a contiguous zone, as defined in article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship are within the limits of the territorial sea, or as the case may be within the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has

been given at a distance which enables it to be seen or heard by the foreign ship.

. . . .

The fifth circuit has rendered several precedent-setting decisions regarding non-U.S. flag vessels. It held in *United States v. Postal*[70] that, notwithstanding a violation of the High Seas Convention to which both the United States and the flag State of the vessel in question, *La Rosa,* were parties, the court had proper jurisdiction over the defendants. *La Rosa,* a pleasure craft of Grand Cayman registry, was initially boarded by a Coast Guard cutter within the 12-mile zone off the coast of Florida. Since the vessel "displayed no flag and exhibited neither name nor home port on her stern,"[71] and the inquiries of the cutter's commanding officer were not satisfactorily answered, the vessel was boarded to verify the documentation papers. After verifying *La Rosa's* registry as that of the Grand Cayman Islands, a British territory, the boarding officer returned to the cutter, which maintained overt surveillance of the *La Rosa. La Rosa* was following an erratic course and the second boarding for conducting a customs search took place beyond the 12-mile zone. One of the boarding officers saw "numerous bales 'of what looked like marijuana,' " and in response to his inquiry as to how much there was, defendant Postal said, "About eight thousand pounds . . .. About two and a half million dollars."[72]

The court found that the first boarding was justified under article 22(1)(c) and (2) of the High Seas Convention insofar as there was reasonable suspicion about the true nature of the vessel's nationality. Regarding the second boarding, however, the court concluded that it could not be justified either under article 22 or 23 of the Convention and

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70. 589 F.2d 862 (5th Cir. 1979).

71. *Id.* at 866.

72. *Id.* at 867-68.

in fact was a violation of article 6. The court further noted that since the Grand Cayman Islands was also a party to the Convention, the United States' obligations vis-à-vis the Grand Cayman vessels would be governed under the convention were it to be considered a self-executing treaty,

> [b]ut the question we must answer is whether by ratifying the Convention on the High Seas the United States undertook to incorporate the restrictive language of article 6, which limits the permissible exercise of jurisdiction to those provided by treaty, into its domestic law and makes it available in a criminal action as a defense to the jurisdiction of its courts. There is nothing in the circumstances surrounding the formulation and adoption of the Convention that would support the conclusion that it did.[73]

Thus, the court held that "article 6 is not self-executing and that, by virtue of the *Ker-Frisbie* doctrine, the defendants cannot rely upon a mere violation of international law as a defense to the court's jurisdiction."[74]

Earlier, the fifth circuit had decided in *United States v. Cadena*,[75] that the boarding at a distance of 200 miles from the Florida coast of a freighter flying no flag, sailing without lights, and carrying contraband for delivery to the United States, the search of the vessel and the arrest of Colombian crew members aboard the freighter were valid. The court concluded that

> [i]n the absence of a foreign state's ratification that would ensure reciprocal respect for these principles of international law, neither comity, domestic law, nor concepts of due process and fundamental fairness, require such a purging.[76]

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73. *Id.* at 877.

74. *Id.* at 883.

75. 585 F.2d 1252 (5th Cir. 1978), *rehearing den.*, 588 F.2d 100 (5th Cir. 1979).

76. 585 F.2d at 1261.

It rejected the appellants' contention that the treaty merely restates customary international law and therefore they could invoke "those underlying doctrines that are part of the corpus juris of nations." [77] In the court's words:

> there is no basis for concluding that violation of these international principles must or should be remedied by application of the exclusionary rule or by dismissal of the indictment unless Fourth Amendment interests are violated.[78]

The Coast Guard's boarding and searching of a stateless ship on the high seas poses no serious problems in United States courts, for stateless vessels are considered subject to the jurisdiction of the United States for the limited purposes of eliciting information about the vessel's identity and registration. In *United States v. Cortes,*[79] the fifth circuit said that such vessels "are not entitled to the same protection afforded vessels registered in a foreign nation which is a signatory of the [High Seas] Convention." [80] The seventh circuit followed the *Cortes* rationale in *United States v. Rubies,*[81] where an armed boarding by the Coast Guard occurred at a distance of 150 miles off the coast of Washington.

Pursuant to U.S. statutes,[82] "special arrangement" with another sovereign allowing the boarding and seizure of a vessel claiming its registry would confer on the Coast Guard proper jurisdiction over the vessel to enforce the U.S. laws. In *United States v. Dominguez,*[83] the fourth circuit relied on permission granted by the Commonwealth of the Bahamas to board and seize a vessel and to convert its crew

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77. *Id.*
78. *Id.*
79. 588 F.2d 106 (5th Cir. 1979).
80. *Id.* at 110.
81. 612 F.2d 397 (7th Cir. 1979).
82. 19 U.S.C. §§ 1581(h), 1587(a) (1976).
83. 604 F.2d 304 (4th Cir. 1979).

200 miles from the U.S. shore for alleged violation of the U.S. laws designed to suppress drug smuggling into the country. Although both the United States and the Commonwealth of the Bahamas are parties to the High Seas Convention,[84] the court found the authorization to board and enforce the U.S. laws pursuant to "special arrangement" as determinative of the issue of legality, for under these circumstances, "we need not determine the legality of the seizure by the terms of [the High Seas Convention]." [85] Also, the vessel in question had sought to change its nationality on the high seas which would have rendered it stateless and therefore subject to search under U.S. law.

Occasionally, the United States has justified its assertion of criminal jurisdiction over foreign vessels and alien crews on the high seas by invoking the objective territorial principle of jurisdiction. As Mr. Justice Holmes defined the principle, in the context of an interstate extradition: "Acts done outside a jurisdiction, but intended to produce and producing effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect . . . ." [86] And, as the fifth circuit said in *United States v. Cadena:* "Jurisdictional and territorial limits are not co-terminous. The nation has long asserted the objective view, under which its jurisdiction extends to persons whose acts have an effect within the sovereign territory even though the acts themselves occur outside it." [87]

III. Challenges to U.S. Jurisdiction — Fishery Cases

Under the Fishery Conservation and Management Act of 1976 (FCMA),[88] the United States asserts jurisdiction for

84. *See* note 30 *supra.*

85. 604 F.2d at 308.

86. Strassheim v. Daily, 221 U.S. 280 (1911).

87. 585 F.2d at 1257, citing, among other cases, Ford v. United States, 273 U.S. 593 (1927), and United States v. Winter, 509 F.2d 975 (5th Cir. 1975).

88. 16 U.S.C. §§ 1801-22 (1976).

the limited purpose of conserving and managing fisheries resources over a zone beyond the territorial waters of the United States and extending seaward for 200 miles.[89] In *United States v. Tsuda Maru*,[90] the federal district court of Alaska upheld warrantless search of the Japanese fishing vessel Tsuda Maru which was sighted fishing 167 miles southwest of St. Matthew Island in the Bearing Sea. Subsequently, the Coast Guard seized the vessel and her documents which were taken to Alaska, further searches were conducted without a warrant and, based on discrepancies between the vessel's log and the frozen fish in possession and the "surimi" (processed fish product) on board, the United States sought forfeiture of the defendant vessel for violation of the appropriate provisions of the FCMA and the implementing regulations.[91] When the Coast Guard initially boarded the vessel for routine inspection authorized by the FCMA,[92] there was no suspicion or probable cause that a violation of the FCMA had occurred.

The court interpreted the statutory language "with or without warrant" to show that "Congress wished to emphasize that enforcement of fishing regulations in the conservation zone was not to be inhibited by the warrant requirement." [93] The court noted that the Tsuda Maru was fishing in the area as a licensee under the FCMA and pursuant to a U.S.-Japan agreement which acknowledged the exclusive fishery management authority of the United States. The court further noted that a recognized exception to the search warrant requirement is "searches of licensees authorized by statute in an industry that is 'pervasively regulated,' " [94] and "long subject to close supervision and

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89. *Id.* § 1811.

90. 470 F. Supp. 1223 (D. Alaska 1979).

91. 16 U.S.C. §§ 1821, 1857 (1976), and the implementing regulations, 50 C.F.R. §§ 611.9(d)(2)(vi) through (viii), (d) (3) (1978).

92. 16 U.S.C. §§ 1821(a), (c)(2)(A)(i, ii), 1861(b) (1976).

93. 470 F.2d at 1228.

94. *Id.*, citing United States v. Biswell, 406 U.S. 316 (1972).

inspection,"[95] especially when such regulatory inspections further federal interests. Thus, the court concluded that "the federal interests present and the pervasive and historical regulation of fishing bring this case well within the exception to the warrant requirement defined in *United States v. Biswell*, 406 U.S. 311 . . . (1972) (federal gun control) and *Colonnade Catering Corp. v. United States*, 397 U.S. 72 . . . (1970) (federal alcohol regulation)."[96] The court also found that after the initial boarding and inspection, "the Coast Guard and other enforcement personnel had probable cause to justify the seizure and subsequent searches and that they were reasonable under the circumstances."[97] However, the court suggested that the scope of such warrantless searches "is implicitly restricted to those areas of the ship which must be inspected to enforce the fishing regulations,"[98] thus excluding "living quarters and the crew's personal property where the expectation of privacy is entitled to more weight."[99] Also, the court noted in dictum its doubts about the fruits of such a search being used for purposes beyond the purview of the FCMA.[100]

Prior to the promulgation of the FCMA, the Coast Guard, in September 1974, seized a Japanese fishing vessel at a distance of 67.9 miles off the U.S. coast for violating the 1966 Contiguous Fisheries Zone Act,[101] under which a 12-mile fisheries zone had been established. The vessel was sighted within this zone and after the Coast Guard gave it a signal to stop, the vessel attempted to escape by accelerating toward the high seas. The Coast Guard began

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95. *Id.*, citing Colonnade Catering Corp. v. United States, 392 U.S. 72 (1970).

96. *Id.* at 1230.

97. *Id.*

98. *Id.* at 1229.

99. *Id.*

100. *Id.*

101. 16 U.S.C. § 1091 (repealed 1976). Also pertinent is the 1964 Bartlett Act, 16 U.S.C. § 1081 (repealed 1976).

hot pursuit from within the fisheries zone and effectively apprehended the vessel on the high sea. In *United States v. F/V Taiyo Maru,*[102] the Japanese owner of the vessel contested the U.S. jurisdiction, contending that it violated the Convention on the Territorial Sea and the Contiguous Zone [103] to which both Japan and the United States are parties. The defendant argued that since article 24 of the Convention authorizes the establishment of a contiguous zone for the specific purpose of enforcing regulations — and since article 23 allows hot pursuit of a foreign ship from such a contiguous zone only for these four enumerated purposes — the United States lacked authority to commence hot pursuit of the said vessel from within its fisheries zone for the purpose of enforcing its fisheries law, which is not one of the purposes recognized by article 24. Interpreting the language of article 24 in light of the legislative history of the convention, the court found it to be permissive, rather than restrictive, and concluded that the Convention "contains no specific undertaking by the United States not to conduct hot pursuit from a contiguous fisheries zone extending 12 miles from its coast. The *Cook* exception, therefore, is not applicable, because the United States has not by treaty 'imposed a territorial limitation upon its own authority.' " [104] It held its jurisdiction to be proper since the seizure of the vessel was not in violation of article 23 of the

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102. 395 F. Supp. 413 (D. Me. 1975).

103. *See* note 38 *supra.*

104. 395 F. Supp. at 420. The *Cook* case referred by the court is Cook v. United States, 288 U.S. 102 (1933), which, read with Ford v. United States, 273 U.S. 593 (1927), are the authorities for the exception to the general rule of law, that the power of the government to enforce a forfeiture or to prosecute a defendant is not impaired by the illegality of the method used to acquire control over the property or the defendant. The *Ford/Cook* doctrine is that when a treaty itself imposes territorial limitations upon the exercise of the powers granted under the treaty, the seizure of a defendant or other subject of the court's jurisdiction in disregard of these limitations is invalid.

convention, and "was sanctioned by domestic law and in conformity with the prevailing consensus of international law and practice. . . ." [105]

IV. Conclusion

The discussion of the recent U.S. practice has shown the courts' inclination to uphold the Coast Guard's assertion of its authority pursuant to statutes and in contravention of customary international law principles and even the High Seas Convention to board and search vessels, both of U.S. and foreign registry, in U.S. offshore areas — territorial waters, contiguous zones, and on the high seas. It is submitted that a balancing between the U.S. interests in enforcing its laws against drug smuggling and for fishery conservation and management in its offshore areas and the world community's interests in the freedoms associated with the freedom of the seas doctrine would favor a limited, reasonable exercise of this asserted authority by the United States.[106]

Assuming that the asserted jurisdiction is proper, courts still have to confront constitutional challenges to warrantless vessel searches and seizures. The courts have yet to establish a coherent body of principles and precedents to pass upon the validity of the major exceptions invoked by the government to justify such searches and seizures — exigent circumstances, border searches, and administrative searches.[107] Since the important goal of curbing drug traffic has to be accomplished within the confines of the fourth amendment protections, it is imperative that the courts set clear guidelines and, in one specific area, (that of admin-

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105. 395 F. Supp. at 421.

106. *See generally* M. McDougal & W. Burke, *supra* note 33, at 747-51.

107. *See generally* Note, note 3 *supra*.

istrative searches) declare as violation of the fourth amendment those random and subterfuge searches without probable cause by the Coast Guard which, although conducted under the guise of administrative searches, are in essence designed to seek evidence of crime.

Chapter Three

PROTECTING UNITED STATES CITIZENS ABROAD THROUGH TREATIES

United States Treaties on the Execution of Penal Sentences

Robert E. Dalton

Throughout history, as new international problems have emerged, new forms of treaties have been developed by States to deal with them. Problems of naturalized citizens that manifested themselves in the nineteenth century led to the inauguration in 1868 of a series of bilateral U.S. treaties known as Bancroft treaties.[1] The adoption of the eighteenth amendment to the Constitution establishing Prohibition led to a series of Smuggling Conventions designed to keep liquor from entering the United States.[2] The emergence of large prisoner populations in foreign jails led to the

1. *See, e.g.*, the conventions with Germany (North German Confederation), Feb. 22, 1868, 15 Stat. 615, T.S. No. 261, 8 Bevans 70; Austria-Hungary, Sept. 20, 1870, 17 Stat. 833, T.S. No. 12, 5 Bevans 437; Belgium, Nov. 16, 1868, 16 Stat. 747, T.S. No. 24, 5 Bevans 476; Denmark, July 20, 1872, 17 Stat. 941, T.S. No. 69, 7 Bevans 24; and Sweden and Norway, May 26, 1869, 17 Stat. 809, T.S. No. 350, 11 Bevans 888.

2. *See, e.g.*, the conventions with Belgium, Dec. 9, 1925, 45 Stat. 2456, T.S. No. 759, 5 Bevans 539, 72 L.N.T.S. 171; Chile, May 27, 1930, 46 Stat. 2852, T.S. No. 829, 6 Bevans 558, 133 L.N.T.S. 141; Denmark, May 29, 1924, 43 Stat. 1809, T.S. No. 693, 7 Bevans 72, 27 L.N.T.S. 361; France, June 30, 1924, 45 Stat. 2403, T.S. No. 755, 7 Bevans 938, 61 L.N.T.S. 415; Greece, Apr. 25, 1928, 45 Stat. 2736, T.S. No. 772, 8 Bevans 327, 9 L.N.T.S. 231.

conclusion of treaties among European States,[3] and more recently to a series of bilateral treaties on the execution of penal sentences extending beyond Europe,[4] including the first treaties on this subject concluded by the United States.

At the outset of negotiations for the treaty between Mexico and the United States, many lawyers expressed skepticism as to whether treaties could be developed that would pass constitutional muster. This chapter examines certain critical elements of the treaties, the mechanism established for their implementation, the opinions of scholars as to the most important constitutional issues raised both by treaties and by legislation, and the decisions of U.S. magistrates and U.S. courts, which have dealt with those issues.[5]

On November 25, 1976, the United States signed its first treaty providing for the execution of penal sentences. The impetus for this treaty came from the presence of more than 600 American citizens serving sentences in Mexican jails and a substantial number of Mexican citizens serving sentences in the United States. The presence of a large number of citizens of each of these two countries in the other country's jails led to friction between the two countries. Congressional hearings in the United States highlighting the particular problems that American prisoners were experiencing in Mexico preceded the opening of negotiations. Both countries agreed that there were special hardships involved in being incarcerated in a foreign prison. It is usually difficult or impossible to maintain

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3. The most important of these is the European Convention on the International Validity of Criminal Judgments, signed at the Hague, May 29, 1970, Europ. T. S. No. 70.

4. Canada, France, and the United States have been the principal negotiators of such treaties.

5. Some scholars have raised other questions concerning the treaties that are not examined here. *See, e.g.*, Panst, *The Unconstitutional Detention of Mexican and Canadian Prisoners by the United States Government*, 12 VAND. J. TRANSNAT'L L. 67 (1979).

contact with one's family. Dietary and living conditions differ from those found in the home country. In many cases a prisoner's ignorance of the language in the country in which he is held and his lack of familiarity with the foreign culture exacerbate adjustment. Life in a foreign prison can adversely affect the ease of the prisoner's reintegration into his own society at the end of his term. Indeed, these reasons had led the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders at its 1975 session to suggest the desirability of concluding treaties that would permit a prisoner incarcerated in a foreign jail to serve his sentence in his home country.[6]

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6. At its Sixth Session, in September 1980, the U.N. Congress on the Prevention of Crime and Treatment of Offenders adopted by consensus the following resolution:

> *The Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,*
>
> *Considering* the fact that improved means of transportation and communication, the development of economic and financial resources, and the ensuing mobility of individuals have resulted in increasing the internationalization of crime, and the consequent incarceration of larger numbers of foreign nationals in the prison systems of many Member States,
>
> *Conscious* of the fact that difficulties of communication by reason of language barriers, unfamiliarity with local culture and habits, and the absence of contact with relatives and friends may work excessive hardship on individuals serving sentences in other than their home countries, . . .
>
> *Recognizing* the conclusion reached by the Committee on Crime Prevention and Control in its International Plan of Action, which calls for international co-operation in order to establish procedures that provide for the return of persons convicted of crimes abroad to their home country in order to serve the sentence, thereby facilitating the process of reintegration into society,
>
> *Noting* that such procedures have been established or are being considered by several Member States, especially since the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,
>
> *Bearing in mind* the fact that work on the development of standards for transfer of offenders was identified as a priority by the Committee on Crime Prevention and Control at its fourth session,
>
> 1. *Urges* Member States to consider the establishment of procedures whereby such transfers may be effected, recognizing that any such procedures can only be undertaken with the consent of both the sending and receiving countries and either with the consent of the prisoner or in his interest;

Since the conclusion of the treaty with Mexico, the United States has negotiated similar treaties with Canada,[7] Bolivia,[8] Peru,[9] Panama,[10] and Turkey.[11]

The essence of these treaties is the same, although there are certain presentational differences, especially in the Turkish treaty; these differences, however, are not relevant for the purposes of the analysis of constitutional questions with which this paper deals.

The model treaty on this topic, which is derived from the Mexican treaty, authorizes each of the countries to transfer custody of the other's nationals to their home country. It allows a convicted prisoner to serve the sentence imposed by the other country in his native country. Eligibility for transfer is limited to prisoners convicted of offenses which are criminal under the laws of both countries, who have no appeals pending, and who have at least six months remaining on their sentences at the time processing for transfer begins.

Article IV, paragraph (2) establishes the requirement that a prisoner must give "his express consent for his trans-

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2. *Calls upon* the Secretary-General to provide or facilitate the provision of technical and professional advice and support at the request of Member States that are interested in establishing such procedures;

3. *Requests* the Committee on Crime Prevention and Control to give priority to the development of a model agreement for the transfer of offenders with a view to presenting it to the General Assembly for consideration as soon as possible.

U.N. Doc. A/CONF. 87/C.1/L.8/Sept. 1980.

The adoption of this resolution suggests that the next few years may see a proliferation of similar treaties in many parts of the world where they do not currently exist.

7. Entered into force July 19, 1978, T.I.A.S. No. 9552.

8. Entered into force August 17, 1978, T.I.A.S. No. 9219.

9. Entered into force July 21, 1980, T.I.A.S. No. 9784.

10. Entered into force June 17, 1980, T.I.A.S. No. 9787.

11. S. EXEC. DOC. BB, 96th Cong., 1st Sess. (1979). (Signed at Ankara June 7, 1979, Senate advice and consent to ratification November 30, 1979. Ratification is pending in Turkey.)

fer." A related provision in article V, paragraph (1) gives the home State the right "if it so desires, to verify, prior to the transfer, that the offender's consent to the transfer is given voluntarily and with full knowledge of the consequences thereof, through the officer designated by the laws of the Receiving State." In the negotiations for the Mexican treaty, the Mexicans indicated that there would be no agreement if American courts were to have jurisdiction to review and set aside decisions of Mexican courts. Presumably, the U.S. Senate would not have given its advice and consent to a treaty that permitted Mexican courts to review and set aside criminal judgments of U.S. courts. Article VI of the Mexican treaty, the article on jurisdiction, provides:

> The Transferring State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts. The Receiving State shall, upon being advised by the Transferring State of action affecting the sentence, take the appropriate action in accordance with such advice.

In addition to consent of the prisoner, consent of both parties to the treaty is required. Article IV, paragraph (4) establishes guidance for both States as to whether or not they should grant their consent.[12]

Transferred prisoners serve the sentences imposed by the convicting State subject to the laws and procedures in respect of parole or probation of the country to which they are transferred. However, the right of pardon or amnesty is reserved to the sentencing State since it is the laws of that State that the prisoner has been convicted of violating.[13]

Since the Mexican treaty had no direct analogy in U.S. practice, except for the Status of Forces Agreement with South Korea,[14] and no case had arisen under that

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12. Article V, para. (4). *Cf.* Articles IV and V of Turkish treaty.

13. Article V, para. (2).

14. [1966] 17 U.S.T. 1677, T.I.A.S. No. 6127.

agreement, the Chairman of the Foreign Relations Committee, Senator Sparkman, announced at the hearings that the committee would want to know how the constitutional questions raised by the treaty could be resolved.[15] The committee heard ten witnesses who addressed to a greater or lesser extent the constitutionality of the treaty. The government witness who dealt most extensively with the constitutional issues was Herbert J. Hansell, Legal Adviser of the Department of State. Mr. Hansell stated that the Department had given careful study to the constitutional questions raised by the treaty and, in particular, to those raised by article VI. He indicated that the Department's study had been reviewed by the Department of Justice and by independent scholars. The first reason for the conclusion that article VI was constitutional was what Mr. Hansell called the "conflicts of law" ground. The second was the "waiver" ground. With respect to the first ground, he started with the premise that the prisoner's trial was conducted in a foreign country that lawfully had jurisdiction over him and the offense. Mr. Hansell indicated that the courts had repeatedly said that the U.S. Constitution had no applicability to the conduct of a foreign trial for a foreign offense. The waiver agreement he felt could best be examined in connection with the implementing legislation being developed by the Department of Justice.[16] At the conclusion of the first day's hearings, Mr. Hansell undertook to reply to additional questions for the record. Two questions and answers dealing with article VI merit inclusion here:

> Question 1. Is it in accord with the Constitution of the United States to prevent a U.S. citizen from having access to the appropriate courts of this country if the individual is incarcerated in the United States?

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15. *Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. (June 15-16, 1977).

16. *Id.* at 47.

Answer. As explained in the answers under Articles I and IV, the individual transferred to the United States would have access to the appropriate courts of this country to test the conformity of his transfer and his continued confinement here with the Constitution and the treaty and implementing legislation. What Article VI prevents is his use of a United States, rather than the foreign, court to attack the sentence and conviction handed down by the foreign court. This barrier is fundamental to the operation of the treaty and we believe it to be constitutional. As we have explained elsewhere, as in the prepared statement of Mr. Hansell, we base that belief: (a) on the proposition that the sentence is one of a foreign court to which United States constitutional provisions are not made retroactively applicable by the transfer; and (b) on the consent and waiver of the individual.

Question 2. Would compliance with the treaty require an unconstitutional withdrawal of the jurisdiction of the federal courts?

Answer. As stated in the previous answer, the American courts, specifically the federal courts, will continue to have jurisdiction over many issues raised in the course of transfer, although they will not have jurisdiction over the validity of the foreign conviction or sentence.

Another formulation of the first issue might have been whether the due process clause of the fifth amendment could be construed to prohibit imprisonment on the basis of a foreign conviction if such conviction was obtained by procedures lacking the safeguards of the Bill of Rights. Professor Herbert Wechsler, the noted constitutional authority, testified that the fifth amendment was not designed to limit Mexican criminal procedures or the procedures of any other country. Professor Wechsler went on to state that nothing said by Mr. Justice Black in the plurality

opinion in *Reid v. Covert*, 354 U.S. 1 (1957), as to the application of the Bill of Rights to trial abroad in American courts, had any application to the treaty with Mexico. He pointed out that the treaty takes away no right that the prisoners otherwise would have.

Professor Wechsler then turned to the question of whether the article VI limitation on collateral attack of the foreign conviction in the prisoner's home country presented a difficulty for the acceptance of the treaty.[17] Professor Wechsler pointed out that it was inaccurate to characterize this provision as a suspension of the writ of habeas corpus. He explained: "The writ remains available; it is simply a good return that the offender is imprisoned in accordance with the treaty and its implementing legislation. If the treaty and the statute are valid, as I believe they are, the detention does not violate the Constitution, laws or treaties of the United States. The application for the writ must, therefore, be denied (28 U.S.C. 2241 (c) (3))." [18]

A somewhat fuller analysis of the legal and constitutional problems was made by Professor Allen C. Swan of the University of Miami Law School, who also addressed the due process issues and the alleged foreclosing of habeas corpus. Professor Swan reached the conclusion that the treaty was constitutionally defensible. Indeed, he concluded his testimony by stating that if the Senate felt as a matter of policy that it was desirable to proceed with the treaty, he could

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17. For the view that there is a difficulty, *see* Abramovski & Eagle, *A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty*, 64 Iowa L. Rev. 275, 301 (1979). *But see* Vagts, *A Reply to "A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty,"* 64 Iowa L. Rev. 325 (1979); and Robbins, *A Constitutional Analysis of the Prohibition Against Collateral Attack in the Mexican-American Prisoner Exchange Treaty*, 26 U.C.L.A. L. Rev. 1, 42 (1978).

18. *Hearings*, *supra* note 14, at 93-94. *See also* Wechsler's gloss on this statement to the effect that only if an issue exists as to the voluntariness of the consent or the veracity of the return should the application not be denied. *Id.* at 169-70.

perceive no "important constitutional barrier" to its implementation.[19]

Two editors of the *Harvard Law Review*, the author and editor of a note entitled "Constitutional Problems in the Execution of Foreign Penal Sentences: the Mexican-American Prisoner Transfer Treaty," [20] reached the same conclusion as Professors Wechsler and Swan although by a very different route. They found article VI of the treaty a "constitutional infirmity" that they believed could be cured if prior to transfer each prisoner waived any future right to attack in an American court the validity of his Mexican trial. They counseled the committee that the preliminary draft of the implementing legislation for the treaty drawn up by the Department of Justice should be amended.[21] In particular, they advised including in the legislation a clause authorizing the Attorney General to send a federal magistrate to the foreign country concerned to be present when the prisoner consented to transfer. Indeed, they suggested "it would be wise to require consent actually to be given before the magistrate, rather than to be verified at some later time by the magistrate." Finally, they suggested that the magistrate's proceedings be noted in an official transcript or record, "which will be available to an American judge seeking later to review the validity of the waiver." [22]

Given the wealth of testimony on legal issues that witnesses provided to the committee, it was only natural that the committee should comment on the issues in its report recommending that the Senate advise and consent to the treaties with Mexico and Canada: "All the legal opinions received by the committee concur in the constitutionality of

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19. *Hearings, supra* note 14, at 94, 97. Professor Swan's views are set forth in greater detail in Stotzky & Swan, *Due Process Methodology and Prisoner Exchange Treaties: Confronting an Uncertain Calculus*, 62 MINN. L. REV. 732 (1978).

20. 90 HARV. L. REV. 1500 (1977).

21. For text of preliminary draft, *see Hearings, supra* note 14, at 37-41.

22. *Id.* at 137-38.

the treaties."[23] Noting that the article VI provision, restricting collateral attacks on the sentences of foreign nations to the courts of those nations, has the effect of denying to an American citizen transferred to the United States the opportunity of challenging the validity of his conviction in a habeas proceeding, the committee determined that "any constitutional questions involved in this preclusion of a write [sic] of habeas corpus can be resolved by a valid waiver made at the time of the prisoners' consent to transfer." The committee went on to state its understanding tht procedures would be established under the implementing legislation to provide counseling, legal assistance and information to prisoners eligible for transfer.[24]

The principal forum for examination of the implementing legislation was the Subcommittee on Penitentiaries and Corrections of the Committee on the Judiciary of the United States Senate. Hearings on the implementing legislation were held on July 13 and 14, 1977.[25]

Senator Biden, chairman of the subcommittee, posed the issues in his opening statement. They were: (a) whether it was appropriate to establish a waiver process to preclude review of the foreign conviction by habeas corpus; and (b) if so, how the law may ensure that a prisoner's waiver is "knowing, intelligent and voluntary."[26] The principal witness on the draft legislation prepared by the Justice Department was Deputy Attorney General Peter Flaherty. Mr Flaherty stated that in order to ensure the voluntariness of decisions by prisoners convicted in foreign courts to serve their sentences in the United States, it would be necessary

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23. S. EXEC. REP. NO. 95-10, 95th Cong., 1st Sess. 9 (1973).

24. *Id.* at 9-10.

25. *Hearings on S. 1682 Before the Subcomm. on Penitentiaries and Corrections of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. (July 13-14, 1977).

26. *Id.* at 2.

that government representatives meet with each prisoner to explain the consequences of his or her consent, and the context in which the transfer would take place, and to answer any questions that the prisoner might have. Mr. Flaherty was very specific as to what would take place at the meetings:

> At these meetings the prisoners will be advised of the ramifications of their consent including among other things: the criteria for the selection of the Federal institutions at which they will serve their sentences; their parole eligibility dates; the earliest dates at which they can hope for favorable parole consideration in light of Parole Commission guidelines; to the extent permitted by the positiveness of their indentification, the pendency of warrants for their arrest in the United States such as other detainers that may be waiting for them; their right to consult counsel prior to the transfer verification proceedings; and, the effect of their consent to transfer on their ability to attack their Mexican convictions. All of these matters will have to be discussed with each offender or prisoner separately.[27]

In connnection with his testimony, Mr. Flaherty introduced a document entitled "Suggested Refinements and/or Alternatives With Respect to Proposed Legislation. . ." that takes up 33 pages in the printed hearings.[28] Although he did not specifically refer to the testimony before the Senate Foreign Relations Committee of Messrs. Petree and Chertoff, author and editor of the Harvard Law Review note,[29] he appears to have followed their suggestion in amending proposed section 4108 of the act dealing with the verification. He stated that the change in this section was one of the two most important refinements suggested by the Justice Department. He stated that it was "important to spell out in the legislation itself exactly the procedures to be followed to assure that the verification of consent is obtained with all the constitutional safeguards."[30]

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27. *Id.* at 26-27.

28. *Id.* at 28-61.

29. For testimony, *see id.* at 135.

30. *Id.* at 62.

A comparison of the text of the legislation as it emerged from the House of Representatives with the original draft prepared by the Justice Department showed that section 4108 had been revised by adding three concepts that did not appear in the initial draft. They were: (a) a provision that a prisoner's consent to transfer, once verified by a verifying officer, is irrevocable; (b) a direction to the verifying officer to make necessary inquiries to determine that the offender's consent is voluntary and not the result of any promises, threats, or other improper inducements; and (c) a requirement that the proceedings be recorded either by a reporter or by sound recording equipment and that the Attorney General maintain custody of the records of the proceedings. All had been part of the Justice Department's proposed refinements.

The subcommittee did not restrict itself from examining other issues in connection with the legislation in an effort to satisfy itself as to the constitutionality of the structure it was seeking to complete. Indeed, the subcommittee had before it three memoranda of law that examined the legal issues in considerable detail. The first of these was the *Harvard Law Review* note prepared by Messrs. Petree and Chertoff that had also been considered by the Senate Foreign Relations Committee in connection with its action on the treaty. The second was a report on the legal issues prepared by Charles Doyle of the American Law Division of the Library of Congress.[31] The third was a memorandum of December 15, 1976, prepared by Detlev F. Vagts, the then-Counselor on International Law of the Department of State.[32] Each of these papers, as well as a portion of the testimony of Professor M. Cherif Bassiouni,[33] dealt with consent to transfer and the problems of waiver of constitutional challenge to the foreign conviction.

31. *Id.* at 214-52.

32. *Id.* at 206-16.

33. *Id.* at 132, 137-38. For a refinement of Bassiouni's views and a summary of the provisions that emerged, *see* Bassiouni, *A Practitioner's Perspective on Prisoner Transfer*, 4 J. CRIM. DEF. 127 (1978).

Professor Vagts argued that consent of the prisoner to transfer with the knowledge that he would not have a right to have his foreign conviction reviewed in a U.S. court would provide an adequate basis for sustaining his imprisonment within the United States. He noted that a number of cases have held that it is constitutional to present individuals with some unpleasant choices. For example, in *Tollett v. Henderson,* 411 U.S. 258 (1973), the Supreme Court held that a prisoner who had pleaded guilty to an offense in order to avoid a possible death penalty could not complain that his guilty plea was involuntary.[34] Mr. Doyle's analysis of the issue began with the proposition that constitutional rights may generally be waived if the waiver is voluntary, knowing and intelligent. Turning to the argument that conditions in Mexican jails might vitiate the voluntariness of a waiver, Mr. Doyle cited *United States ex rel. Delman v. Butler,* 390 F.Supp. 606, 609 (E.D.N.Y. 1975), citing *Brady v. United States,* 397 U.S. 742 (1970), for the proposition that "the coercive impact of the Hobson's choice of compromising valuable constitutional rights out of fear of greater punishment should they be asserted in full, does of itself constitute impermissible coercion."[35] On the other hand, Professor Bassiouni, who favored separating waiver from consent and putting it in a more conventional format, speculated that in the case of an offender "imprisoned in circumstances that may be significantly below U.S. minimum standards of confinement... a requirement of a waiver of any rights to challenge his or her continued confinement in the U.S. as a condition to transfer, might create a Hobson's choice sufficient to hold the waiver involuntarily given."[36]

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34. *Hearings, supra* note 25, at 215.

35. *Id.* at 235.

36. *Id.* at 138. The latter proposition was made in several articles on the treaty. *See, e.g.,* Abramovsky & Eagle, *supra* note 16, at 299-300: "The brutal treatment, lack of nourishment and substantial medical care to which an offender could be exposed were he or she not to transfer from

In its report on the legislation adopted after the extensive hearings by the subcommittee, the full Judiciary Committee reported that particular attention had been given to the question of whether the consent to verification procedures contained therein adequately served as a "waiver" of any constitutional rights for judicial review that a transferred prisoner might have had absent article VI of the treaty. The report concluded that all of the experts who appeared before the Subcommittee on Penitentiaries had agreed that the procedures established in the implementing legislation recommended by the committee adequately protected both the offenders' and the treaty nations' rights.[37] The section-by-section analysis of section 4108 contained the following language that, if followed, was designed to prevent the horrible potential abuses adduced in the article [38] by Abramovsky and Eagle cited above:

> The verifying officer is directed to make the necessary inquiries to determine that the offender's consent is voluntary and not the result of any promises, threats, or other improper inducements. Such inquiries may be directed not only to the offender but to any other person. The verifying officer may also consider any document or physical evidence which will assist him in making his determination.[39]

One might have thought that, given the legislative history set out above, the legislation enacted by the House would have been deemed adequate to deal with the matter and would have been accepted by the Senate without change. But such was not in the case. When the Senate Judiciary Committee received the House bill it decided to amend it to deal further with the question of voluntariness. It did so by amending two subsections of section 4108 to require the verifying officer (a) to inquire of the offender

Mexico may by themselves 'constitute threats, or other improper inducements' within the meaning of the statute."

37. H.R. Rep. No. 95-720, 96th Cong., 1st Sess. 27 (1977).

38. Note 17 *supra*.

39. *Supra* note 37, at 37.

whether he "agrees" that the transfer will be subject to the conditions specified in that section and (b) to determine that the offender accepts the transfer subject to those conditions. After adopting that amendment, the Senate Judiciary Committee reported that "based upon competent testimony [it] finds that the procedural framework upon which the legislation is based is sufficiently grounded in constitutional law to warrent enactment." In concluding its report, the committee acknowledged that the issues would be litigated. Indeed, it urged that they be litigated. At the same time, perhaps prophetically, the committee expressed the conviction that the "potential benefits to foreign policy and to individual Americans who may serve prison sentences closer to their home is sufficient to outweigh any risks that await us in these uncharted waters of international law."[40]

On October 28, 1977, President Carter signed Public Law 95-144 providing for the implementation of treaties for the transfer of offenders to or from foreign countries.[41] Since Mexico had earlier completed all the legal requirements of Mexican law, the signing of P.L. 95-144 made it possible to begin transfer. On December 9, 1977, 61 Americans returned from Mexico to the United States; at the same time a substantial number of Mexicans were returned to Mexico to serve their sentences. Since that time there have been 13 additional transfers from Mexico alone. Transfers have also taken place under similar treaties with Canada, Bolivia and Panama and transfers from Peru are expected to take place before the end of 1980. A number of court cases have already arisen under the Mexican, Canadian and Bolivian treaties. It is to the teaching of those cases that we now turn.

By early 1980, approximately twenty cases had been brought in federal courts. Most of these were habeas corpus actions brought under 28 U.S.C. 2241 or 2256 in which

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40. H.R. Rep. No. 95-435, 95th Cong., 1st Sess. 13 (1977).

41. 91 Stat. 1212.

prisoners sought release from federal penitentiaries where they were serving sentences imposed by foreign courts as a result of their transfer pursuant to a treaty. Most of these cases were referred to U.S. magistrates for reports and recommendations. In most cases magistrates recommended denial of the petition as being without merit, and judges approved their recommendation.[42]

The case of *Kanasola v. Bell*, No. 78-177 (E.D. Ky. Magistrate's Rept., filed April 10, 1979) is a typical one. The petitioner, who had been found guilty of the crime of murder by a Canadian jury and sentenced to life imprisonment, requested transfer under the U.S.-Canadian treaty. On October 19, 1978, he was committed to the custody of the warden of the Federal Correctional Institute of Ashland, for execution of his Canadian sentence. On November 14, 1978 he filed a petition for a writ of habeas corpus, challenging the constitutionality of the treaty and asserting that his consent was given under duress.

With respect to the first contention, U.S. Magistrate, Joseph M. Hood, found that the treaty was not unconstitutional as alleged by the plaintiff in that (1) the conclusion of the treaty did not exceed the scope of the federal government's treaty power and (2) the treaty did not suspend the writ of habeas corpus. Citing *Asakura v. Seattle*, 265 U.S. 332, 341 (1924), Magistrate Hood found conclusion of the agreement within the treaty power. Further, he found the subject matter of the treaty an appropriate one for use of the treaty power, citing *Restatement (Second) of the Foreign Relations Law of the United States* § 117 (1965). Magistrate Hood also found that the treaty did not suspend the writ of habeas corpus. Turning to Mr. Kanasola's contention that his consent to transfer was obtained under duress because he would have signed "any

42. The magistrates' opinions in these cases are not published. Eighteen of the nineteen magistrate cases reviewed by the writer that were resolved at the magistrate levels were so decided. The exceptional case, *Reynolds v. United States*, is discussed *infra*.

thing [sic] they gave me" to get back to the United States, the magistrate found that the only "duress" which Mr. Kanasola was under was his own desire to return home and that his consent was voluntarily and understandingly given. Accordingly, Magistrate Hood recommended that Kanasola's petition for writ of habeas corpus be denied.

The case of *Reynolds v. Ralston*[43] illustrates that a petition for a writ of habeas corpus brought by a prisoner returned under the treaty may be granted in some circumstances. The result in the Reynolds case was the petitioner's release from serving in the United States the sentence imposed by the United Mexican States. In this case the petitioner alleged that transfer was made without his consent. The record shows that the petitioner appeared before a U.S. magistrate in Mexico who was authorized to conduct a verification proceeding pursuant to 18 U.S.C. § 4108. The petitioner refused to execute the consent form. At a subsequent hearing at which Mr. Reynolds was not present, the magistrate ruled on a motion that a guardian should be appointed for Reynolds. The magistrate appointed a guardian, who consented for Mr. Reynolds and who signed the petition to transfer.

When the U.S. magistrate reviewed the transcripts of the verification proceedings and the psychiatric report used by the verifying officer as authority for appointment of the guardian *ad litem*, he found that the psychiatrist who had submitted a report that he believed a guardian should be appointed had made no finding that Mr. Reynolds was incompetent or unable to execute a knowledgeable and voluntary consent. The verifying officer had also failed to make such a finding. On the basis of this review, James C. England, the U.S. magistrate, found that "because of the absence of any finding that the offender, himself, was incompetent the subsequent consent of a guardian *ad litem* does not satisfy the requirements of section 4108. . . ." Accordingly, the magistrate recommended that Mr.

43. No. 79-3232-CV-S-WRC (W.D.Mo. filed June 11, 1980).

Reynolds' petition be granted and that he be released from custody. On June 11, 1980, William R. Collinson, U.S. District Judge for the Western District of Missouri, approved the findings of the magistrate and directed that the prisoner be released.

Most of the cases decided by magistrates were brought by prisoners who had been convicted in Mexico and contained factual recitations substantially identical to those recited in the cases of *Pfeifer v. U.S. Bureau of Prisons*[44] and *Rosado v. Civiletti*,[45] the two leading cases that will be discussed in the next part of this paper. Since the *Pfeifer* case was the first to be published, it was generally the authority relied upon by magistrates in denying habeas corpus petitions. The magistrates generally repeated Judge Thompson's holding in the district court in *Pfeifer* that the threat of continued Mexican incarceration is not the kind of duress that would invalidate a petitioner's consent. Frequently, the magistrates added, as Judge Thompson had done, that, were "Pfeifer's test for duress accepted, no prisoner could consent to his transfer." One U.S. magistrate, Raymond J. Durkin, in the case of *United States ex rel. Gustavo Ruiz v. Griffin Bell*,[46] noted that the defendant had stated under oath that no one had threatened him in any way to cause him to sign the consent form. Magistrate Durkin held the petitioner to that statement.

The first published case under the treaty was the district court's decision in *Pfeifer v. U.S. Bureau of Prisons*.[47] At the district court level, Pfeifer challenged the constitutionality both of the treaty with Mexico under which he had been transferred to a federal penitentiary and of the legislation adopted by the Congress to implement the treaty. Most of

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44. Pfeifer v. United States Bureau of Prisons, 615 F.2d 873 (9th Cir. 1980), *aff'g* 468 F. Supp. 920 (S.D. Cal. 1979).

45. Rosado v. Civiletti, Nos. 80-2001 3 (2d Cir., filed Apr. 23, 1980), *cert. denied*, No. 79-6990 (Oct. 6, 1980) (*reversing* Velez v. Nelson, 475 F. Supp. 865 (D. Conn. 1979)).

46. No. 79-16 (M.D. Pa. 1979).

47. 468 F. Supp. 920 (S.D. Cal. 1979)

the facts of the case were indisputable. In 1977 Mr. Pfeifer arrived in Mexico City on a flight from Bogota, Colombia. The Mexican officials who searched his luggage found a can of powder that they claimed was cocaine; they also found three allegedly counterfeit U.S. $100 notes. After he was arrested, Mr. Pfeifer claimed he was abused by Mexican officials. He alleged that he signed a confession after a Mexican official had pulled the hammer back on his pistol and ordered him to do so. Subsequently, Mr. Pfeifer was found guilty of importation of cocaine and possession of counterfeit money and sentenced to seven years' imprisonment for the first offense and five years for the second, the sentences to run consecutively.

Mr. Pfeifer applied in 1978 to return to the United States from Mexico under the treaty. He met with appointed counsel, was given a booklet published by the U.S. Department of Justice that contained questions and answers regarding the operation of the treaty, and appeared at a verification hearing. At the hearing he signed a consent verification form which stated that he consented to transfer and that he understood his Mexican convictions could not be set aside through court proceedings in the United States. He averred that his consent was wholly voluntary and not the result of promises, threats, or coercions or other improper inducements. Approximately six weeks after his return to the United States, Pfeifer filed a petition for a writ of habeas corpus.

Pfeifer first claimed that his Mexican trial was unfair and that he should be released by an American court. Judge Gordon Thompson, citing *Holmes v. Laird,* 459 F.2d 211 (D.C. Cir. 1972), *cert. denied,* 49 U.S. 869 (1972), held that procedures in a foreign court which did not comport with U.S. constitutional practice did not prevent the U.S. from complying with its treaty commitments. Pfeifer's second allegation was that he had not knowingly and voluntarily consented to transfer, despite recitals in the form he had signed that he had done so. Pfeifer argued that he acted

under the "duress factor of having to stay in Mexico and [be] resubjected to deprivation and inhuman treatment." The court, however, stated that "the threat of continued Mexican incarceration . . . is not the kind of 'duress' that invalidates his consent. Rather, it is simply the option Pfeifer had to returning to the United States."[48]

Judge Thompson concluded his opinion in these terms:

> [T]he United States may constitutionally take custody of Americans tried and convicted in foreign countries under procedures that do not comport with the Bill of Rights. . . Pfeifer's transfer complied with the terms of the treaty and its implementing legislation. . .[49]

Mr. Pfeifer appealed Judge Thompson's decision to the U.S. Court of Appeals for the Ninth Circuit; the panel hearing the appeal unanimously affirmed the decision in a succinct and cogent opinion. With respect to Pfeifer's argument that his Mexican conviction should be reviewed because it did not meet our constitutional standards, the court stated:

> [T]he Treaty does not create new rights which enable a foreign convict to have a review of an otherwise final foreign judgment. . . . We recognize that the procedures followed in some foreign countries may not meet our constitutional standards. That fact, however, does not render the challenged portions of the Treaty unconstitutional. . . . Our concern here is the constitutionality of the challenged portions of the Treaty. The constitutionality of the conviction which led to the foreign incarceration is not before us.

The court also examined "the requirement that an offender agree not to challenge his or her conviction in a United States court" and found that the requirement is not an unconstitutional condition. The court pointed out that while a constitutional question arises when a party is required to relinquish a *vested* right as a condition for obtaining a benefit, Pfeifer did not have a vested right to

48. *Id.* at 925.

49. *Id.* at 926-27.

have his foreign conviction examined by a U.S. court. Thus, it found apposite the cases involving conditional presidential pardons, which have upheld conditions where offenders lose no vested rights in accepting a conditional benefit. For this proposition the court relied on *Schick v. Reed*, 419 U.S. 256 (1974), and *Hoffa v. Saxbe*, 378 F.Supp. 1221 (D.D.C. 1974).

Of the cases thus far decided under the treaty, the most celebrated is *Rosado v. Civiletti*.[50] In the district court, Judge Daly held that the three petitioning prisoners' consents to transfer were not "truly voluntary" and were therefore "invalid."

Footnotes to the court's opinion contain testimony of the plaintiffs adduced at the evidentiary hearing in the case which described the way in which they were physically abused during their interrogation. It also indicated appalling conditions of confinement at Lecumberri Prison, in which they were incarcerated for some time before being transferred to Santa Marta prison where they were incarcerated immediately prior to their verification hearings. Focusing on the "circumstances that precipitated petitioners' consents" to transfer to the United States under the treaty, the court found that the petitioners "justifiably believed that if they remained incarcerated any longer in Santa Marta, they would be killed. As a result of all of these circumstances and in particular the fear of imminent death," the district court believed that the petitioners would have signed anything to get out of Mexico. Based upon these conclusions, Judge Daly found that "the United States has no lawful custody of petitioners under the terms of the treaty and the writs of habeas corpus are hereby granted."

Following the decision of the district court, the Mexican government delivered a diplomatic note to the Department of State in which it expressed the view that the decision

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50. Note 45 *supra*.

constituted a violation of article IV of the treaty.[51] In addition, the Attorney General of Mexico informed a senior member of the staff of the U.S. Embassy in Mexico, that it was the intention of the Mexican government to terminate its obligations under the treaty at the earliest possible moment [52] if Judge Daly's decision stood. An affidavit by Assistant Secretary of State for Inter-American Affairs, Viron P. Vaky, dealing with both these communications was filed with the court in a post-hearing communication. Believing Judge Daly's decision to be wrong, the U.S. government appealed his decision to the Court of Appeals for the Second Circuit.

On April 23, 1980, Judges Kaufman, Timbers, and Lasker unanimously reversed Judge Daly's decision.[53] Chief Judge Kaufman's opinion was a comprehensive analysis of the issues raised. He found that the plaintiffs had "demonstrated that their convictions under the laws of the sovereign state of Mexico manifested a shocking insensitivity to their dignity as human beings and were under a criminal process devoid of even a scintilla of rudimentary fairness and decency." On the other hand, the court recognized "the laudable efforts of the executive and legislative branches, by both treaties and statute to ameliorate, to their utmost power, the immense suffering of U.S. citizens held in Mexican jails." It pointed out that the statutory procedures governing transfer of prisoners to the United States were carefully structured to ensure that each prisoner voluntarily and intelligently agreed to forego his right to challenge the validity of his Mexican conviction. Balancing the interests of citizens still imprisoned abroad and their potential right to transfer against those of the

51. Aide Memoire submitted to the Department of State by Mexican Embassy in Washington, August 10, 1979.

52. In accordance with article X of the treaty, Mexico was entitled to give notice of termination within the ninety days prior to Nov. 30, 1980, the third anniversary of the treaty's entry into force.

53. Note 45 *supra*.

petitioners, the court held that the petitioners were estopped from receiving the relief sought.

After analyzing the provisions of the implementing legislation with respect to the requirement of consent, the court examined the appropriate standard for appraising voluntariness. It noted that, in assessing voluntariness, Judge Daly had relied primarily on *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), in which the Supreme Court upheld the validity under the fourth amendment of a citizen's consent to the search of his automobile. In the context of searches and seizures, the *Schneckloth* court sought to strike a balance between the collective interest in effective law enforcement and the constitutional requirement of freedom from unwarranted governmental intrusion. In that context the court postulated a rule defining a standard by which over-zealous law enforcement would be deterred and individual rights vindicated.

In the view of the court of appeals, the test of voluntariness in the prisoner transfer context should be different. Invalidating consents of citizens electing to transfer on the basis of unconscionable acts taken by Mexican officers acting within the territorial jurisdiction of Mexico was not likely to deter those officials from repeating more acts. Indeed, the court continued:

> Since Mexico is a sovereign nation in no sense subject to the judgments of this court, we could neither deter its officials from committing similar cruelties in the future, nor vindicate the individual interests of those still incarcerated in Mexican prisons, by invalidating these petitioners' consents. At most, we could simply complicate our delicate relations with Mexico. More important, however, is the interest of those Americans who are currently, or may soon find themselves, caught up in Mexico's criminal justice system. If, here, the conduct of Mexican officials on Mexican soil were held to be determinative of the voluntariness of the American prisoners' consent to transfer, those prisoners most desperately in need of transfer to escape

> torture and extortion, including the petitioners at bar, would never be able to satisfy a magistrate that their consents were voluntarily given.[54]

In balancing the relevant interests, the court turned for guidance on the voluntariness issue from the standard for lawful searches and seizures to the standard applicable to voluntariness of guilty pleas. The principal cases relied on by the court were *Brady v. United States*, 397 U.S. 742 (1970), and *North Carolina v. Alford*, 400 U.S. 25 (1970). In the latter case, the court emphasized that "voluntariness of a guilty plea is not measured by whether the individual's decision reflected a wholly unrestrained will but rather whether it constituted a deliberate, intelligent choice between available alternatives." The court went on to find that the petitioners had the alternative of remaining in Mexico and serving their sentences there or transferring and receiving the protection of American laws governing parole and the conditions of their confinement. The court concluded that their consents to transfer were voluntarily and intelligently made.

In the final section of its opinion the court asked whether the petitioners, having agreed at the verification hearing that they understood that they could not challenge their Mexican convictions in U.S. courts, were estopped from doing so. Before deciding this issue, the court completed an exhaustive examination of the legislative history of the implementing legislation.[55] It found that the Congress went to great lengths to ensure that a transferring prisoner would not only be informed of the treaty's provisions but also that he or she would agree to abide by them. In particular, it was satisfied that the congressional decision to require offenders to abide by the jurisdictional article of the treaty was "neither needless nor arbitrary."

The court then noted that the treaty required three consents prior to transfer: those of the two governments and

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54. *Supra* note 45, at 20.

55. *Id.* at 12-16, 38-40.

that of the prisoner. The court stated "the consents contemplated by the treaty entail much more than simple expression of the decision to transfer, and the permission to do so. They also include reciprocal representations by each of the parties upon which the others rely in deciding to give their consent."[56] The Court then described what each party agrees to and noted the prisoner's promise "to abide by the terms of the treaty, including the reservation of jurisdiction to Mexico over all challenges to conviction and sentences imposed by its courts." The court concluded that in light of this background if the petitioners had refused to agree to abide by the treaty's conditions, neither Mexico nor the United States would have consented to their transfer.

In order to assess whether the "bargain should be enforced," the court examined whether the United States had advanced "a sufficiently important interest in holding these prisoners to their bargain." It answered that question affirmatively for two reasons. First, the United States had an interest in eliminating what had become an important source of tension between the two nations. But of paramount importance to the court was its interest in affording an opportunity to others "similarly victimized" as the petitioners to "escape their torment."[57] Guided by the principles set out in its opinion, the court of appeals reversed Judge Daly's decision.

As the Supreme Court has recently denied certiorari in *Rosado*,[58] the teaching of the cases decided by U.S. courts of appeals stands that the jurisdictional article in the prisoner treaties and the mechanism for expressing voluntary consent to transfer established by the implementing legislation applicable to all such treaties are constitutional. In light of these developments, the United States is continuing to negotiate similar treaties where warranted.

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56. *Id.* at 40.
57. *Id.* at 43-44.
58. Note 45 *supra.*

The Unconstitutional Detention of Prisoners by the United States Under the Exchange of Prisoner Treaties

Jordan J. Paust

I. Introduction

The United States Government is actively pursuing new treaty regimes to enable the transfer of prisoners in foreign countries to the United States for incarceration within our borders. Although some writers openly applaud these developments,[1] there has been inadequate attention paid to a critical aspect of the transfer process, the subversion of United States constitutional guarantees, and our system of constitutionally derived federal powers which has necessarily been set in motion by the new transfer arrangements.

Scholars have addressed related concerns,[2] but of primary import is the fact that no federal power exists under the U. S. Constitution to incarcerate an individual within the United States who was prosecuted, not for a violation of our law, but for a violation of foreign law in a foreign tribunal using foreign procedures. This fact is of central concern because where no federal power exists to

1. *See, e.g.*, Bassiouni, *Perspectives on the Transfer of Prisoners Between the United States and Mexico and the United States and Canada*, 11 Vand. J. Transnat'l L. 193 (1978); and Vagts, *A Reply to "A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty,"* 64 Iowa L. Rev. 325 (1979).

2. Generally there has been attention to rights, waivers and consent. *See, e.g.*, Abramovsky, *A Critical Evaluation of the American Transfer of Penal Sanctions Policy*, 1980 Wis. L. Rev. 25; Abramovsky & Eagle, *A Critical Evaluation of the Newly Ratified Mexican-American Transfer of Penal Sanctions Treaty*, 64 Iowa L. Rev. 275 (1979); Robbins, *A Constitutional Analysis of the Prohibition Against Collateral Attack in the Mexican-American Prisoner Exchange Treaty*, 26 U.C.L.A. L. Rev. 1 (1978); and Freedman, letter, N.Y. Times, May 20, 1980, at 18, col. 4.

incarcerate an individual, incarceration is constitutionally impermissible and should be voided by the judiciary.

Interrelated are two matters addressed more fully below: (1) whether the U. S. government can create a new federal power to incarcerate individuals by treaty, and (2) whether the government is necessarily involved with foreign State illegalities, where they exist, when the government subsequently imprisons the victims of such improprieties. If the government is so involved, this presents an additional reason why incarceration in the United States should be voided.

II. The Question of Federal Powers

The central question tc be faced by the judiciary is whether an agreement with a foreign State, or a set of agreements, can create a federal power that does not otherwise exist. Can an agreement with a foreign State authorize the continued incarceration in the United States, and by the United States, of individuals who were prosecuted for violations of foreign law in a foreign tribunal using foreign procedures? In my opinion, the answer must be no. No agreement with a foreign government can or should ever confer such powers upon the government of the United States or any state within the United States.

As the Supreme Court declared emphatically in *Reid v. Covert*, "no agreement with a foreign nation can confer power on the Congress, or on any branch of Government, which is free from the restraints of the Constitution." [3] This is so because the United States and the powers of the federal government are "entirely a creature of the Constitution." [4] As the Court emphasized: "Its power and authority have no

3. 354 U.S. 1, 16 (1957). The quoted language constitutes "(t)he definitive pronouncement on this constitutional question." *See* J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 184 (1978), also citing several other cases in support.

4. *See id.* at 5-6; *see also* Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 Cornell L. Rev. 231 (1975); and note 6 *infra*.

other source. It can only act in accordance with all the limitations imposed by the Constitution. . . [and it] has no power except that granted by the Constitution. . ."[5] National sovereignty as well as any power not expressly delegated remains with the people of the United States[6] and, as the Court seemed to recognize, the only constitutionally permissible method for creating a new grant of federal power would be that involving a constitutional amendment.[7] In any event, new federal powers cannot be created by treaty.

In this instance, it should be readily apparent that, presently, the federal government has no power to incarcerate persons who were prosecuted for violating a domestic law that was not authorized by Congress in a tribunal that was not authorized by Congress. Furthermore, even if prosecution occurred in an authorized tribunal for a violation of a law authorized by Congress, the

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5. *See id.* at 6, 12. *See also Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 119, 120-21 (1866); and United States v. Tiede, U.S. Court for Berlin, Criminal Cases Nos. 78-001 and 78-001A (1979), adding that "foreign policy" considerations do not justify a violation of the Constitution and that, at home or abroad, "everything American public officials do is governed by, measured against, and must be authorized by the United States Constitution." *Id.* at 23-24. For a useful analysis of Judge Stern's opinion and the background concerning *United States v. Tiede*, see Gordon, *American Courts, International Law and "Political Questions" Which Touch Foreign Relations*, 14 INT'L LAW. 297 (1980). The opinion of Judge Stern in *United States v. Tiede* is reproduced at 19 INT'L L. MAT. 179 (1980).

6. *See* Paust, *The Concept of Norm: Toward a Better Understanding of Content, Authority and Constitutional Choice*, 53 TEMP. L. Q. 226, 275 n.200 (1980); Paust, *International Law and Control of the Media: Terror, Repression and the Alternatives*, 53 IND. L.J. 621, 622 (1978), and cases and authorities cited. For this reason, it is improper to argue that the federal government must possess the powers that some or all foreign governments possess. In our democracy, not all powers were granted and sovereignty exists not with the Government, but the people.

7. *See id.* at 17; *see also* B. SCHWARTZ, CONSTITUTIONAL LAW 104 (2nd ed. 1979).

incarceration would be constitutionally impermissible if conviction resulted from procedures that were constitutionally impermissible. What the prisoner transfer agreements actually involve are precisely the types of constitutional impropriety mentioned above: (1) incarceration for violations of domestic laws not authorized by Congress, (2) incarceration based upon prosecutions in tribunals that were not authorized by Congress, and (3) incarceration based upon convictions which resulted from procedures that would not be constitutionally permissible in this country. In view of *Reid v. Covert,* clearly the federal government constitutionally cannot do indirectly that which it cannot do directly.[8] Clearly also, agreements with foreign governments can add nothing to federal powers that do not exist.

It is also worth emphasizing that several cases supplement these fundamental recognitions by affirming that despite the involvement of "foreign affairs," "foreign policy" or diplomatic concerns, the President cannot violate U.S. Constitutional law.[9] Indeed, the Supreme Court has

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8. *See also* SCHWARTZ, note 7 *supra.*

9. In addition to Reid v. Covert, note 3 *supra,* and the cases cited in notes 10-12 *infra, see* United States v. Tiede, note 5 *supra;* United States v. Ehrlichman, 376 F. Supp. 29, 33 (D.D.C. 1974); Zweibon v. Mitchell, 516 F.2d 594, 626-27 (D.C. Cir. 1975), *cert. den.*, Barrett V. Zweibon, 425 U.S. 944 (1976), adding:

> A plethora of other cases have similarly recognized constitutional limits on the President's powers as Commander-in-Chief or as the nation's spokesman in the arena of foreign affairs. The Supreme Court has indicated that "even the war power does not remove constitutional limitations safeguarding essential liberties," Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 426 (1934).

Other cases are in general accord. For example, it is beyond doubt that whatever discretion the President may have concerning the implementation of law while exercising his duty faithfully to execute the law, the President can never lawfully violate the law. *See* Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838); Nixon v. Sampson, 389 F. Supp. 107, 136 (D.D.C. 1975), *stay granted,* 513 F.2d 430 (D.C. Cir. 1975); and Nixon v. Sirica, 487 F.2d 700, 711 (D.C. Cir. 1973); *see also* Butz v. Economou, 438 U.S. 478, 505-06 (1978); United States v. Nixon, 418 U.S. 683 (1974);

stressed that even in time of war, when executive powers which do exist are admittedly at their highest, the President is bound by the Constitution.[10] Even the opinion in *Curtiss-Wright*, which is wrongly cited by others for the broad proposition that executive power in the area of foreign affairs must prevail even against law, actually recognized and reaffirmed the fundamental constitutional precept that "every . . . governmental power, must be exercised in subordination to the applicable provisions of the Constitution." [11]

Similarly, as a federal court recognized during a war-time context in *Toledo, P. & W.R.R. v. Stover*, "(t)he executive department of our government cannot exceed the powers granted to it by the Constitution and the Congress, and if it does exercise a power not granted to it, or attempts to exercise a power in a manner not authorized by statutory enactment, such executive act is of no legal effect." [12] When constitutional powers do not exist, the existence of "foreign affairs" or even a crisis context does not change the constitutional fact that an exercise of a power not granted remains legally impermissible and void.

In view of the above, I remain unpersuaded by an argument made by one of the conferees that the United States

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The Paquete Habana, 175 U.S. 677 (1900); United States v. Lee, 106 U.S. 196, 220 (1882); *Ex parte* Milligan, *supra* note 5, at 120-21; Brown v. United States, 12 U.S. (8 Cranch) 110 (1814); and The Flying Fish, 6 U.S. (2 Cranch) 170, 178-79 (1804) (Presidential orders to military officers in time of war cannot "legalize" illegal actions taken abroad).

10. *See, e.g.*, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952); and *Ex parte* Milligan, *supra* note 5, at 120-21.

11. *See* United States v. Curtiss-Wright, 299 U.S. 304, 320 (1936) (a case which actually involved congressionally delegated power despite overly broad dicta). This recognition of constitutional subordination makes *Curtiss-Wright* consistent, on this point, with cases like Reid v. Covert, note 3 *supra*, Youngstown Sheet and Tube Co. v. Sawyer, note 10 *supra*, and *Ex parte* Milligan, note 5 *supra*.

12. 60 F. Supp. 587, 593 (D. Ill. 1945); *see also Ex parte* Milligan, *supra* note 5, at 119 ("duty to declare the nullity of the whole proceedings").

has the power to incarcerate these individuals because it has, internationally, the power to protect U.S. nationals abroad through ordinary diplomatic processes.[13] Its quite a leap in logic to argue that the government "protects" an individual by incarcerating him without benefit of U.S. constitutional guarantees, but the important point is that diplomatic protection is a far different type of power than the power to incarcerate.[14] The existence of one does not impliedly point to the existence of the other and, more importantly, no matter how a justifying argument proceeds, one must ultimately face the dispositive fact that no federal power exists in our Constitution to incarcerate persons who were tried by constitutionally impermissible procedures in unauthorized tribunals for violations of unauthorized laws.

Seemingly Orwellian concerns about the "protection" of U.S. nationals should be viewed against the background of constitutionally subversive effects which would flow from a judicial acceptance of the theory that the ends (i.e., "protection") justify the means. Moreover, the point about "means" that one finds in cases like *Reid* and *Curtiss-Wright* precludes further consideration of such a theory. As the Court has declared consistently, the government "can only act in accordance with all the limitations imposed by the Constitution." [15] Thus, it can only act to

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13. The argument was made by Stephan Saltzburg, Professor, University of Virginia School of Law.

14. In no case has diplomatic protection included actual incarceration. Moreover, diplomatic protection is a process which occurs at the international level. It has nothing to do with domestic incarceration.

15. Reid v. Covert, *supra* note 3, at 6; *see also id.* at 14 ("expediency" is no excuse). As *Reid v. Covert* demonstrates, this is true whether or not the government acts at home or abroad. *See also* Balzac v. Puerto Rico, 258 U.S. 298, 312-13 (1922); *Ex parte* Milligan, *supra* note 5, at 120-21; United States v. Tiede, note 5 *supra;* United States v. Toscanino, 500 F.2d 267, 280 (2d Cir. 1974); and Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955) (5th Amend. protects alien from government acts abroad in time of war). United States v. Toscanino, *supra*, at 274, also addressed the

"protect" an individual (whenever it has the power to "protect") in accordance with all of the limits imposed by the Constitution. In view of the fact that one such limit is the fifth amendment, it is obvious that the government can only act lawfully by complying with the requirements of the fifth amendment, even assuming arguendo that it otherwise has a power to act by incarcerating an individual for a violation of foreign law.

It is also worth noting that the fifth amendment seems clearly to prohibit the incarceration contemplated by these treaties, for no individual can be deprived of liberty, whatever the reason, without due process of law. This seems especially so in view of the predominant expectations of our forefathers that no person should "be deprived of his liberty, except by the law of the land or the judgment of his peers."[16] Never was it expected that one could be incarcerated by a government (federal or state) because one had violated a foreign law. Indeed, as expressed in our Declaration of Independence, it was thought to be perniciously impermissible to subject an individual "to a jurisdiction foreign to our Constitution, and unacknowledged by our laws."[17] When our government

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ends and means theory (pernicious and unacceptable doctrine that the ends justify the means) as did *Ex parte* Milligan, note 5 *supra* (ends do not justify the means, nor do "exigencies of government" or "the theory of necessity"). *See also* Bassiouni, *supra* note 1, at 262-63.

16. As evidence of such an expectation, *see, e.g.*, VA. CONST. of 1776, § 8; PA. CONST. of 1776, art. IX; MD. CONST. of 1776, art. XXI; N. C. CONST. of 1976, art. XII; VT. CONST. of 1777, art. X; MASS. CONST. of 1780, art. XII; N. H. CONST. of 1784, art. XV. The Northwest Ordinance of 1787, in Article II, which applied to settlers outside the United States, also guaranteed the same right by federal enactment. All of these documents are conveniently reproduced in SOURCES OF OUR LIBERTIES (R. Perry & J. Cooper eds. 1972). Importantly, the Fifth and other Amendments to the U.S. Constitution were patterned after the rights adopted in state constitutions. *See, e.g., id.* at 422, 424-25. On a related point, *see also Ex parte* Milligan, *supra* note 5, at 119.

17. *See* SOURCES OF OUR LIBERTIES, *supra* note 16, at 320.

acts to incarcerate individuals for violations of foreign law, it acts itself as one subjecting an individual to a jurisdiction foreign to our Constitution and our laws. Thus, it acts in a manner contrary to democratic and constitutionally relevant precepts enshrined in historic documents of liberty.

III. U. S. Involvement in Foreign State Illegalities

Since the United States government can only act in accordance with all of the limits imposed by the Constitution, a related question is posed by the existence of foreign State illegalities during arrest, prosecution and/or foreign State incarceration. Putting aside the fact that the government has no power under the Constitution to incarcerate, does the government also become "associated" or "inextricably involved" with foreign State illegalities by subsequently imprisoning the victims of foreign State improprieties?[18] The obvious answer, as any perceptive child might point out to a naked king, is yes. Clearly, the United States is "involved" when it fulfills the very object of the illegal conduct "by imprisoning the convicted offender, thereby completing the criminal process." [19]

As Professor Ira Robbins admits, "Under the Prisoner Exchange Treaty . . . the United States is in fact executing the punishment of a crime based solely on a foreign conviction, absent an intervening trial or hearing in the United States to determine probable guilt or innocence, or even to determine whether the foreign trial comported with rudimentary principles of due process." [20] Such a

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18. *See* Robbins, *supra* note 2, at 8, 10, 42.

19. *See id.* at 10, 42 (emphasis added).

20. *Id.* at 10 (emphasis added). *See also* Pfeifer v. United States Bureau of Prisons, 468 F. Supp. 920, 924 (C.D. Cal. 1979) ("American custody of convicts originally tried and imprisoned in Mexico . . . is [a] form of enforcing a foreign sentence"), *aff'd*, 615 F.2d 873 (9th Cir. 1980); and Abramovsky & Eagle, *supra* note 2, at 306-07 (the United States is "inextricably connected" and "a full partner"). Professor Martin Shapiro

post-conviction involvement, one that actually executes the punishment of the victim, occurs at a critical stage in the overall process. Again, it fulfills the object of the illegal conduct of others, the actual incarceration of the victim. Yet, despite the obvious and significant involvement of the United States in perpetuating such a harm, some have sought to wish it away or conclude, as if by magic, that, legally speaking, it really doesn't exist.

Perhaps the most artful dodge, one that Humpty Dumpty himself would have been quick to appreciate, can be found in the comment by Professor Detlev F. Vagts. After recognizing the artful first premise of an Interstate Corrections Compact that the receiving State acts "solely as agent for the sending State," [21] Professor Vagts jumps dubiously to the double conclusion: (1) that the final incarceration is actually the "creature" of the sending State, and, "thus," (2) that "the act of accepting the task of carrying out a foreign sentence of confinement [does not constitute an acceptance of or involvement in] a joint venture with the sending government." [22]

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has also written: "the fact is these people are being deprived of their liberty by the American government without due process. . . ." Letter to the author, Jan. 17, 1980. Similarly, Professor Alan Swan has commented that a "court cannot deny that the imprisonment *is* an act of the American government. . . ." Robbins, *supra* note 2, at 11 n.44. He added that because a U.S. Court has a choice whether to allow imprisonment or to free an individual, the decision to allow imprisonment is itself "a deliberate decision by [an] American authority to deprive that prisoner of his liberty." Statement of Prof. Swan before the Senate Foreign Relations Committee, *reprinted in* Robbins, *id.* at 11. The point is that when the court makes a choice one way or the other, that is itself an act of the federal government. By analogy, *see also* Shelley v. Kramer, 334 U.S. 1 (1948).

21. *See* Vagts, *supra* note 1, at 333. Despite the obvious unreality inherent in this first premise, one should note that the Interstate Corrections Compact is only applicable within the United States and is thus applicable only to inmates who had the benefit of constitutionally permissible prosecutions, including the possibility of a complete federal review.

22. *See id.*

I might be far too blinded by reality to fully appreciate his acrobatic skills, but it seems inescapable that his first premise and each of his subsequent conclusions are the purest of "transcendental nonsense." [23] First, the United States acts, if at all, as the United States. To pretend that it really does not act when it acts "solely as [an] agent" of Mexico is to engage in the sort of "transcendental nonsense" thinking that Felix Cohen rightly condemned early in this century. Similarly, when the United States incarcerates someone, a U.S. incarceration is not "solely" the "creature" of a foreign government; and who among the realists could believe for a moment that when the government deliberately accepts the task of carrying out a foreign process it does not thereby accept and become involved in a joint venture with that foreign government.

Indeed, earlier in his comment Professor Vagts writes that when the U.S. extradites a person, knowing that a fair process will not be applied, "clearly [there] is much more [of] a participation in a foreign process bereft of . . . guarantees . . . than is acceptance of custody of an individual whose foreign trial is completed. . . ." [24] Thus, with these words, he necessarily admits that there is a U.S. "participation in a foreign process bereft of the guarantees of the U.S. Constitution." [25] Additionally, when our government acts as an "agent" of the sending State, one is clearly faced with the question of a complicitous relationship with the sending State. Agency would provide a complicitous link rather than an avoidance of responsibility.

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23. *See generally* Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

24. *See* Vagts, *supra* note 1, at 332.

25. *Id.* (emphasis added). Professor Vagts may be correct "that the Mexican conviction is [not thereby] transmuted into a United States proceeding" (as Abramovsky and Eagle might suggest — see *id.* at 332, *but see id.* at 331), but the fine point hardly matters when there is, in fact, a clear participation, a completing of the process, and an executing of the punishment.

I assume it is clearly understood that U.S. involvement in the torture of an American abroad which occurs prior to a foreign conviction is both constitutionally and internationally impermissible.[26] Contrary to what might be the opinion of the district court in the *Pfeifer* case (the reasoning is sketchy and unclear),[27] it is my opinion that an involvement by the United States does not become permissible merely because it occurs after the torture of an American has taken place, and, in fact, occurs at a critical stage in the overall process, since it fulfills the object of the illegal torture (i.e., the actual incarceration of the victim). Additionally, I find the reliance in *Pfeifer* on *Holmes v. Laird* misplaced,[28] since the court in *Holmes* failed even to consider a central set of questions posed by the use of torture — the violation of human rights by the "sending" State, and a complicitous involvement in such a violation by subsequent return by the United States for incarceration despite our international obligation to respect and assure the observance of fundamental human rights.[29]

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26. *See, e.g.*, Robbins, *supra* note 2, at 8. On a related point, *see also id.* at 9 n.37, quoting Professor Vagts.

27. *See* Pfeifer v. United States Bureau of Prisons, *supra* note 20, at 468 F. Supp. 923-24. On appeal, the Ninth Circuit held that there must be "substantial participation" by U.S. agents or the "joint venture doctrine" does not apply. *See* Pfeifer v. United States Bureau of Prisons, *supra* note 20, at 615 F.2d 873. The Ninth Circuit, however, ignored both the fact that there is no power under our Constitution to incarcerate and that many Supreme Court cases demonstrate that whether or not there is a "joint venture" our Constitution applies to *all* federal conduct overseas. *See, e.g.*, cases cited note 15 *supra*, and discussion in the text accompanying notes 49-53 *infra*. Moreover, the Ninth Circuit did not address the problem posed by human rights violations.

28. Pfeifer v. United States Bureau of Prisons, *supra* note 20, at 468 F. Supp. 923.

29. It should also be noted that in another case deprivations of fundamental rights led the court to conclude that, under the circumstances, the prisoners' consent to transfer was voluntary and, thus, void. *See* Velez v. Nelson, 475 F. Supp. 865, 867-74 (D. Conn. 1979). Concerning the U.S. obligation to observe and assure a respect for human rights, see U.N. CHARTER, arts. 55(c), 56.

As I have commented elsewhere,[30] where violations of human rights have occurred in the relevant foreign country (with regard to foreign convictions or foreign post-conviction treatment), for the United States to carry out the sentence of a foreign State in such a circumstance, the United States would be exercising control over individuals in a manner that is inconsistent with the constitutional guarantees of due process of law (as well, perhaps, as freedom from cruel and unusual punishment). Where violations of human rights had occurred with regard to foreign conviction or post-conviction treatment, the transnational implications of a U.S. involvement would be serious and potentially disruptive of long-term U.S. foreign policy and our interest in promoting fundamental human rights for all persons. It can even be argued that when human rights are known to have been violated, subsequent incarceration by the United States in accordance with an agreement with a foreign State violates the obligation of the United States under the United Nations Charter to take "joint and separate action" toward implementation of a universal respect for and observance of human rights and fundamental freedoms for all persons.[31] Charter obli-

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30. *See* Paust, *The Unconstitutional Detention of Mexican and Canadian Prisoners by the United States Government*, 12 VAND. J. TRANSNAT'L L. 67 (1979). Here, I borrow substantially from that publication.

31. *See* U.N. CHARTER, preamble and arts. 1, 2, 55(c), 56. The "pledge" to take action which is set forth in Article 56 of the Charter creates at least two sorts of duty: (a) the "duty to promote" human rights guarantees, and (b) the duty, at a minimum, to not deny human rights protections to persons who are within a State's territory or otherwise subject to its power. *See, e.g.*, 1970 Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States, U.N.G.A. Res. 2625 (1970) ("Every state has the duty to promote"); and the Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, [1971] I.C.J. Rep. 58, 131 ("a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter"). With regard to human rights obligations, it is also significant that the International Court has

gations, moreover, clearly prevail over any inconsistent agreements between the United States and Canada or Mexico;[32] and fundamental human rights, as obligations *erga omnes*, would prevail as well.[33]

In any event, the federal government would, in a functional sense, be doing indirectly (through the actions of a foreign State, its subsequent agreement with a foreign State, and its subsequent actions) what all readily would admit that it cannot do directly either at home or abroad.[34] And this it cannot do. Further, by exercising control over such individuals, the federal government would become a complicitor in what functionally amounts to a continuous and serious deprivation of fundamental constitutional rights, if not also a continuous violation of fundamental human rights. Under the circumstances, the government's

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declared that "rules concerning the basic rights of the human person" are "obligations *erga omnes*" (*i.e.* owing by each State to all persons). *See* Case Concerning the Barcelona Traction Light and Power Co. (Belgium v. Spain), [1970] I.C.J. Rep. 4, at paras. 33-34. The government of the United States clearly agrees that every State has a duty to respect and observe human rights. In its recent memorial before the International Court, the United States declared:

> The existence of such fundamental rights for all human beings, national and aliens alike, and the existence of a corresponding duty on the part of every State to respect and observe them, are now reflected, *inter alia*, in the Charter of the United Nations, the Universal Declaration of Human Rights and corresponding portions of the International Covenant on Civil and Political Rights, regional conventions and other instruments defining basic human rights. . . .

Memorial of the United States before the I.C.J. in the Case of United States v. Iran at 71 (1979). Several rights reflected in the Universal Declaration and the 1966 Covenant were also declared to be part of customary international law. *See id.* at 71-72.

32. *See* U.N. CHARTER, art. 103.

33. *See, e.g.*, Paust & Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNAT'L L. 1, 26-27, 33-34 (1978), and authorities cited.

34. *See also* notes 8, 9, 15 *supra*.

choice to incarcerate presents the requisite intent, for knowing of the violation of human rights (once the claim is raised or it is otherwise discovered) the government chooses to continue the incarceration. Although cases of prosecution for criminal complicity with regard to violations of international law are few and the standards sometimes sketchy,[35] I believe it is fair to use the term complicity in connection with a knowing continuation of the deprivation growing out of human rights violations.[36] In any event, such action is clearly inconsistent with our obligations under the U.N. Charter to respect and insure respect for human rights even when the victims are our own nationals,[37] and I do not doubt for a moment that we would yell "complicity" or some such phrase if the Soviets had incarcerated the 50 U.S. hostages recently released from Tehran. Sure, the Soviets would also commit their own violation of human rights law by continuing the incarceration; and so would the U.S. government if it imprisoned any victims of human rights deprivations without a fair U.S. trial and a conviction based upon violations either of U.S. or international law.

IV. Additional Considerations

Professor Cherif Bassiouni makes the additional point that a violation of human rights law poses a traditional question of conflict of laws *i.e.*, whether the public policy of the United States is thwarted by a U.S. recognition of a foreign penal judgment which arose out of a violation of

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35. *See generally*, Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 Mil. L. Rev. 99, 166-69 (1972).

36. *See id; see also* United States v. Toscanino, *supra* note 15, at 276 ("accomplices" to law violations). Clearly one does not have to control the conduct of foreign officials in order to engage in complicitous acts.

37. *See, e.g.*, note 31 *supra*.

human rights).[38] It certainly is;[39] but the problems posed are much more substantial. With a functionally complicitous implementation of such a judgment by the United States, not only are our public policies, both foreign and domestic, placed in jeopardy, but our Constitution and our system of government are jeopardized as well.

It is also important to recognize that one of the reasons why U.S. courts have refused to execute a foreign penal judgment in the United States [40] is probably the refusal to allow the subversion of U.S. constitutional guarantees for protection of the civil rights of persons accused of crime. Another important reason would seem to be the refusal of U.S. courts to be dictated to by foreign courts and the refusal to allow foreign courts, in effect, to exercise the powers of the federal judiciary. Such underlines the importance of the point made elsewhere, that the United States government has no constitutional powers to implement, either within the United States or abroad, the penal sentences requiring incarceration that were passed by a foreign tribunal utilizing foreign procedures and applying what is purely a foreign criminal law. Moreover, any attempt by the executive and the Senate to force a judicial recognition of all relevant foreign penal judgments through a treaty provision should be struck down as an indelicate attempt to interfere with judicial powers that must be exercised by

38. *See* Bassiouni, *supra* note 1, at 262, 264.

39. *See, e.g.*, 22 U.S.C. § 2304(a)(1) (1976); Maynes, *New Hopes for Human Rights*, 77 DEP'T STATE BULL. 556 (1977); Boyd, *Contemporary Practice of the United States Relating to International Law*, 71 AM. J. INT'L L. 753, 758-60 (1977) (quoting address by Cyrus Vance); *see also* 22 U.S.C. § 1732 (1976). On the actual use of human rights by the United States Supreme Court, *see, e.g.*, J. Paust, Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content (forthcoming).

40. *See* Bassiouni, *supra* note 1, at 264; and RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 427 (1934) ("[N]o state will punish a violation of the criminal law of another state"). The case of Cooley v. Weinberger cited by Bassiouni, *supra* note 1, at 264 n.24, might be distinguished or even approved by the U.S. Supreme Court for reasons stated above.

federal courts on an ad hoc basis if ever they could be exercised constitutionally under any circumstances.

With regard to the question of waivers of rights, whether or not a right can be waived it is clear that an individual cannot grant a power to the federal government that does not exist, neither by a "waiver," a solemn grant, a signed and sealed document, nor by any other means. Again, the United States government is "entirely a creature of the Constitution" and "[i]ts power and authority have no other source;" [41] sovereignty remains with the people of the United States, and an individual as such can create no power in the government, even in conjunction with an agreement with a foreign government and congressional "implementing" legislation. Federal powers exist, if at all, under the Constitution.

There is an additional question whether the "waiver" of a right to challenge the foreign conviction is of any ultimate legal significance.[42] Such a waiver cannot waive the right to challenge a federal exercise of federal powers that do not exist, nor can it waive the independent power of the judiciary to uphold the law. Moreover, such a waiver cannot amount to a waiver of the right to challenge a U.S. complicity in what is arguably an incarceration of individuals in the United States which has resulted from procedures that would be unconstitutional by U.S. standards had the government engaged in such directly. What would thus

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41. *See* Reid v. Covert, note 3 *supra.*

42. As Bassiouni stated, the "waiver" of the right to a collateral attack on the original sentence is likely to be held unconstitutional. *See* Bassiouni, *supra* note 1, at 265; *see also* Abramovsky & Eagle, note 2 *supra;* and Robbins, *supra* note 2, at 5. Recently, the Ninth Circuit has concluded that one can waive the right to challenge the validity of a Mexican conviction. *See* Pfeifer v. United States Bureau of Prisons, note 27 *supra.* The Ninth Circuit, however, treated the matter as one involving a waiver of due process "rights" and did not address the question of powers, human rights or the matters addressed in the next portions of the text.

be challenged would not be the foreign conviction as such, but the U.S. government's involvement in what amounts to U.S. governmental control of individuals in an unconstitutional manner. At least for these reasons, there could not have been a waiver of the use of the writ of *habeas corpus*. From the human rights standpoint, it is also important to note that a violation of fundamental human rights can neither be "waived" by an individual nor by a government.[43] Such are obligations *erga omnes*,[44] and to the extent that human rights are also constitutionally protected rights of those incarcerated,[45] the acceptability of the prisoner transfer agreements and mechanisms is even more suspect. Further, if human rights were violated in any specific case the remedies open to individuals are generally enlarged.[46] Federal court remedies, moreover, are not precluded by the act of state doctrine when the relevant conduct of a foreign State involves fairly clear violations of international law.[47] Indeed, when human rights are

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43. *See, e.g.*, note 33 *supra*; and Paust, letter, 71 AM. J. INT'L L. 508 (1977). Professor Bassiouni also notes without further comment that human rights violations "would invalidate the waiver." Bassiouni, *supra* note 1, at 259.

44. *See* Paust & Blaustein, *supra* note 33, at 34, and authorities cited.

45. In general, they are. *See, e.g.*, Paust, *Human Rights*, note 4 *supra*; Paust, *International Law*, note 6 *supra*; Paust, *Human Dignity*, note 39 *supra*; *c.f.* Lillich, *The Role of Domestic Courts in Promoting International Human Rights Norms*, 24 N.Y.L.S. L. REV. 153 (1978). Whether human rights were violated would, of course, depend upon the circumstances in each case. A new federal hearing should be available for such a purpose.

46. Beyond constitutional protection of human rights in U.S. courts, there are possibilities of complaints to the United Nations and the Organization of American States.

47. *See, e.g.*, Paust, *The Mexican Oil Spill: Jurisdiction, Immunity and Acts of State*, 2 HOUS. J. OF INT'L L. 239, 253 (1979); and Paust, letter, 18 VA. J. INT'L L. 601 (1978).

violated, federal remedies seem mandated by the Universal Declaration of Human Rights.[48]

Professor Stephen Saltzburg raised an additional question whether the government acts unconstitutionally if it cannot control illegal conduct on the part of a foreign government. In view of the above, the answer clearly is yes. To reiterate some main points, first, the Government acts improperly by knowingly carrying out the purpose of foreign illegalities through its own deliberate act of incarceration, and the tree remains poisonous even though

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48. A failure by the judiciary to recognize a judicial remedy for a violation of human rights law would necessarily clash with the obligation to affirmatively guarantee an "effective remedy" in competent national tribunals that is recognized in Article 8 of the Universal Declaration of Human Rights. It should also be noted that the Declaration is a significant indicia of the human rights obligations of the United States that are contained in the United Nations Charter. *See, e.g.*, the United States Memorial in United States v. Iran, note 31 *supra;* M. McDougal, H. Lasswell & L. Chen, Human Rights and World Public Order 273-74, 323-30 (1980); Paust & Blaustein, *supra* note 33, at 15-16; Higgins, *Conceptual Thinking About the Individual in International Law*, 24 N.Y.L.S. L. Rev. 11, 22 (1978); Sohn, *The Human Rights Law of the Charter*, 12 Tex. Int'l L. J. 129, 133-34 (1977) (actually considering the Declaration as now a part of customary law); address by H. Hansell, Legal Adviser, United States Department of State, *reprinted in* 1977 Proc., Am. Soc'y Int'l L. 207, 208 ("authority and guidance"); address by L. Meeker, *reprinted in* 1975 Proc., Am. Soc'y Int'l L. 255 (defining content); address by C. Maw, *id.* at 261; B. Schluter, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, 61 Cal. L. Rev. 110 (1973) (see especially authorities cited in footnote 19, page 126); Newman, *Interpreting the Human Rights Clauses of the U.N. Charter*, 5 Human Rights J. 283, 285-86 (1972); *see also* Schreuer, *The Impact of International Institutions on the Protection of Human Rights in Domestic Courts*, 4 Israel Y.B. Human Rights 60, 77-88 (1974) (with many useful examples of state court implementation); G. Tunkin, Theory of International Law 79-81 (1974); Preamble, 1969 American Convention on Human Rights, *reprinted in* 65 Am. J. Int'l L. 679 (1971); and other authorities cited in Paust & Blaustein, *supra*. Article 25 of the American Convention, *supra*, recognizes the same right to a prompt and effective remedy.

it was foreign-grown. Second, the government can have a complicitous relationship with a foreign government that it cannot control. Third, and more importantly, the government acts unconstitutionally in all cases, since it has no power to incarcerate under the circumstances.

The language in some case, if read uncritically, might cause some to argue that our courts must find an initial violation of law "by or at the direction of American agents" [49] or there will be no further constitutional questions raised. However, such an argument would be wrong for several reasons. First, as noted above, this case involves federal incarceration based solely upon a foreign conviction. Thus, the present case raises constitutional issues not mentioned by other cases. Second, as noted above, subsequent conduct by the United States is enough to render U.S. participation improper. Third, complicitous relationships do not require that foreign illegalities be initiated "at the direction of" U.S. agents. The question in such a case is simply whether or not there is complicitous participation. Moreover, since the Constitution regulates the conduct of our federal government "whenever and wherever the sovereign power of that government is exerted," [50] it regulates any form of conduct and, thus, any form of participation.[51]

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49. For examples of such case language, see United States v. Orsini, 424 F. Supp. 229, 231, 235 (E.D.N.Y. 1976); United States v. Lira, 515 F.2d 68, 70 (2d. Cir. 1975), *cert. den.* 423 U.S. 847 (1975); United States v. Toscanino, *supra* note 15, at 280.

50. Balzac v. Puerto Rico, note 15 *supra; see also* Reid v. Covert, note 3 *supra* (can *only* act in accordance with the Constitution); and *Ex parte* Milligan, *supra* note 5, at 120-21 ("at all times, and under all circumstances").

51. Although *Orsini* and *Lira* might be understood otherwise, all that the courts stated in those cases was that for a *Toscanino* holding to apply there must be impermissible conduct perpetrated by U.S. agents. *See* United States v. Orsini, note 49 *supra;* and United States v. Lira, note 49 *supra*. *Toscanino*, of course, is not the only relevant consideration. Furthermore, both courts were careful to demonstrate that there was *no* federal "involvement," awareness, or "consent" to illegalities. *See* United

It should also be noted that the "by or at the direction of" language contains a potential inconsistency, since conduct "by" federal agents can certainly include any conduct "by" such persons abroad, not just conduct which directs others to do certain things. As *Reid v. Covert* makes clear, the federal government "can only act" — thus, anywhere or anytime — in accordance with all the limitations of the Constitution.[52] Since any form of conduct and, thus, any form of participation with others is regulated, the recent holding of the Ninth Circuit which limits the "joint venture doctrine" to cases of "substantial participation" misses the point.[53] Merely because there is not a joint venture or substantial participation, one should not simplistically conclude that federal conduct is permissible.

Professor Saltzburg had also asked whether there should be a distinction between circumstances involving a U.S. request for evidence to be obtained in violation of our Con-

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States v. Orsini, *supra* note 49, at 235-36; and United States v. Lira, *supra* note 49, at 70-71. But more importantly, *Toscanino* did not limit the inquiry merely to a U.S. "direction." As the court noted, this language was a part of the allegations made by Toscanino. *See* United States v. Toscanino, *supra* note 15, at 281; *see also id.* at 276. Further, although the *Toscanino* holding as such related to actual abduction by U.S. agents, the court's holding hinged upon recognition "(t)hat the Bill of Rights has extraterritorial application to the conduct abroad of federal agents. . . ." *See id.* at 280. Thus, inquiry should be made with regard to any form of conduct. Such an approach, moreover, is the only approach that is consistent with relevant Supreme Court cases, especially Reid v. Covert, *supra* note 3, at 6; Balzac v. Puerto Rico, note 15 *supra;* and *Ex parte* Milligan, *supra* note 5, at 120-21. *See also* United States v. Tiede, note 5 *supra.*

52. *See* note 5 *supra.*

53. *See* Pfeifer v. United States Bureau of Prisons, note 27 *supra.* Closer to the any federal conduct approach recognized in Supreme Court cases above is United States v. Jordan, 24 C.M.A. 156, 159-60, 51 C.M.R. 375, 378-79 (1976); *see also* Abramovsky & Eagle, *supra* note 2, at 305 (nearly any participation with a foreign government should also be considered a "joint venture").

stitution and a receipt of such evidence in the absence of a request. But again, the tree remains poisonous even though it was foreign-grown. As Professor Swan pointed out in his testimony before the Senate Foreign Relations Committee, the exercise of a choice after the fact, knowing of the improprieties, is itself a deliberate decision to utilize the fruit of the poisoned tree in a constitutionally impermissible way.[54] The very fact that a court uses such evidence means that there has been an impermissible federal action.[55]

While addressing these and other questions, Professor Saltzburg made what I feel are his most important points: (1) that wherever the government acts it acts lawfully only in accordance with the Constitution,[56] and (2) that "we have an obligation not to lend sanction to outrageous conduct in other countries." We lend sanction to foreign illegalities, I would aver, whenever we carry out the penal sentences of the foreign State by incarcerating its victims or use the fruit of a poisoned tree instead of refusing thereby to become involved. More importantly, such conduct is both unauthorized by the Constitution and subversive of our constitutional safeguards and freedoms.

As Mr. Jefferson might have added, "Our legislators are not sufficiently apprised of the rightful limits of their power; that their true office is to declare and enforce only our natural rights and duties, and to take none of them from us."[57]

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54. *See* note 20 *supra*.

55. By analogy, *see, e.g.*, Shelley v. Kraemer, note 20 *supra; see also* United States v. Toscanino, *supra* note 15, at 275 ("the court's acquisition of power . . . represents the fruits"), 276 (refusal to tolerate, countenance or become an accomplice to violations of law).

56. Clearly this is true. *See, e.g.*, notes 5, 15 *supra*. In fact, Professor Saltzburg's language was close to that of the Court in Balzac v. Puerto Rico, note 15 *supra*.

57. Jefferson to F. W. Gilmer, June 7, 1816, *reprinted in* THE WORKS OF THOMAS JEFFERSON 31-33 (P. Ford ed. 1905). *See also* D. Malone, JEFFERSON AND THE RIGHTS OF MAN 158 (1951); and the contemporary expectations of Thomas Paine and others quoted in Paust, *supra* note 4, at 242.

V. Postscript

After this paper was written, the Second Circuit handed down its opinion reversing the lower court's holding in the *Velez* case.[58] Although the Second Circuit never really addressed the crucial constitutional issue noted here (i.e., whether the Government has the power under our Constitution to incarcerate persons who have been given no U.S. trial and violated no U.S. law), Judge Kaufman's opinion offers several related statements that should not be ignored.

Within his opinion, one finds statements supportive of the author's general position. For example, the opinion notes that "the Government's power to punish citizens may be exercised *only* in accordance with the due process of law prescribed by the Bill of Rights," [59] and that a person's "liberty is restricted by United States authorities once he is placed in American custody." [60] In terms of the problem posed by U.S. involvement, the opinion also noted that "although the Constitution cannot limit the power of a foreign sovereign . . . it does govern the manner in which the United States may join the effort." [61]

With regard to the question of U.S. involvement, however, the Court declared that the deprivations complained of occurred in Mexico without any American "involvement." [62] The Court did not really address the issue raised earlier in this paper whether the United States joins or is involved in improprieties by knowingly carrying out foreign incarceration. Instead, the opinion offered a Humpty Dumpty nonsense type of statement as a substitute for realistic, constitutional analysis: "The instant Treaty does not call upon the United States to enforce Mexico's

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58. *See* Rosado v. Civiletti, Nos. 80-2001-03, slip op. at 2525 (2d Cir. April 23, 1980).

59. *Id.* at 2554, *citing Ex parte Milligan* and *Reid v. Covert. See also* United States v. Tiede, note 5 *supra.*

60. *Id.* at 2550.

61. *See id.* at 2557.

62. *See id.* at 2543.

penal laws . . . but only to execute criminal convictions . . ." [63] or, as the opinion notes later, to incarcerate Americans "pursuant to a foreign conviction." [64] Yet, as any child might know, incarceration pursuant to a conviction, and which executes the conviction, certainly enforces the penal law. Moreover, incarceration pursuant to and executing the conviction involves the very "power of punishment" which, as the court recognized, can "be exercised *only* in accordance with the due process of law prescribed by the Bill of Rights." [65] As recognized earlier in our constitutional history, it is by the "Constitution and the laws authorized by it [that] this question must be determined" and it is, moreover, by "the protection of the law [that] human rights are secured." [66]

Perhaps more disturbing is the fact that so-called governmental "interests," such as the "interest in promoting good relations with Mexico by honoring its criminal convictions" [67] and the interest in taking actions which serve "to relieve a worrisome source of tension in Mexican-American relations," [68] were sprinkled among strings of rationalization as if, somehow, they might obviate the need to comply with the Constitution or they could, themselves, confer governmental powers that do not exist.[69] It is, at least, a pernicious notion that "governmental interests" could justify any sort of constitutional impropriety or confer any power not authorized by the people of the United States in the Constitution.[70]

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63. *Id.* at 2562.

64. *See id.* at 2562.

65. *Id.* at 2554 (emphasis added).

66. *See Ex parte* Milligan, *supra* note 5, at 119.

67. *See* Rosado v. Civiletti, *supra* note 58, at 2545.

68. *See id.* at 2552.

69. For additional references to governmental interests in the opinion, *see id.* at 2565, 2567.

70. *See also* Paust, *supra* note 4, at 243; and *Ex parte* Milligan, note 5 *supra*.

For similar reasons, one must take exception to the reasoning of Judge Kaufman that "a sovereign power" is not precluded "from extending recognition to another's penal laws where it chooses to do so," [71] since in the United States the people alone are sovereign, not the government,[72] and the people, through the Constitution, have not chosen at any time in our history to extend recognition to another's penal laws or, importantly, to incarcerate citizens who have not violated our laws and have not been provided the guarantees of the Bill of Rights, much less human rights. It is only by constitutional amendment that this could authoritatively be possible,[73] and this has not occurred.

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71. *See* Rosado v. Civiletti, *supra* note 58, at 2551.

72. *See, e.g.*, note 6 *supra*.

73. *See* note 7 *supra*. In contrast, it can be noted that violations of international law (as opposed to mere foreign law) can be prosecuted in the United States and result in incarceration within the United States, since the Constitution already contains the necessary provisions. *See also* Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971).

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